

A close-up photograph of a hand using a paintbrush to apply black paint to a textured, reddish-brown surface. The surface appears to be a piece of paper or fabric with a rough, fibrous texture. The background is dark and out of focus. The hand is in the foreground, and the brush is in the process of painting a dark, curved line, possibly representing a mouth or a shadow.

## **Next Steps Towards Reform:**

Assessing good practice  
and gaps in Commonwealth  
sexual offences legislation

Asia

## Acknowledgements

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Design and editing: Elle Greet and Leisha Lister.

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### About the Equality & Justice Alliance

The Equality & Justice Alliance is a consortium of international organisations with expertise in advancing equality, addressing the structural causes of discrimination and violence, and increasing protection to enable strong and fair societies for all Commonwealth citizens, regardless of gender, sex, sexual orientation, or gender identity and expression.

The members of the Alliance are the Human Dignity Trust, Kaleidoscope Trust, Sisters For Change and The Royal Commonwealth Society.

The Alliance was formed following the Commonwealth Heads of Government Meeting in London in April 2018 during which the then UK Prime Minister Theresa May announced that as Chair-in-Office of the Commonwealth the UK would support Commonwealth governments that want to reform their laws that discriminate against women and girls and lesbian, gay, bisexual and transgender (LGBT) people, many of which are a colonial legacy.

The Equality & Justice Alliance was formed to provide this support during the period April 2018 to March 2020, with funding from the UK Foreign and Commonwealth Office in support of the commitments made during CHOGM 2018.

### About the Human Dignity Trust

The Human Dignity Trust is an organisation of international lawyers supporting local partners to uphold international and constitutional human rights law in countries where private, consensual sexual conduct between adults of the same sex is criminalised. Over 70 jurisdictions globally criminalise consensual same-sex intimacy, putting LGBT people beyond the protection of the law and fostering a climate of fear, stigma, discrimination and violence. Many of these laws sit alongside other sexual offences laws that discriminate against or fail to protect women, children and other marginalised groups. The Trust provides technical legal assistance upon request to local human rights defenders, lawyers and governments seeking to eradicate discriminatory laws and improve protection against violence and hate crimes.

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# TABLE OF CONTENTS

ACKNOWLEDGMENTS	I
NOTE ON AUTHORS	II
ABOUT THE RESEARCH	III
<b>PART A: ABOUT THIS REPORT</b>	<b>6</b>
OVERVIEW	7
TERMINOLOGY	10
SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND THE NEED FOR REFORM	11
GOOD PRACTICE LEGISLATION MUST BE IMPLEMENTED AND ENFORCED	14
INTERNATIONAL & REGIONAL HUMAN RIGHTS LAW AND SEXUAL OFFENCES LEGISLATION	15
<b>PART B: ABOUT THE GOOD PRACTICE CRITERIA</b>	<b>18</b>
1. SEXUAL ASSAULT – UNIVERSAL CRITERIA	19
2. SEXUAL ASSAULT – ADDITIONAL CRITERIA IN RELATION TO CHILDREN	27
3. SEXUAL ASSAULT – ADDITIONAL CRITERIA IN RELATION TO PEOPLE WITH DISABILITY	32
4. CONSENSUAL SAME-SEX SEXUAL ACTIVITY – CRITERIA	35
<b>PART C: COUNTRY CHECKLISTS</b>	<b>39</b>
ASIA OVERVIEW	40
BANGLADESH	44
BRUNEI DARUSSALUM	48
INDIA	54
MALAYSIA	58
PAKISTAN	64
SINGAPORE	68
SRI LANKA	72
<b>ENDNOTES</b>	<b>78</b>

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# About the Research

This research was commissioned by the Human Dignity Trust (the **Trust**) on behalf of the Equality & Justice Alliance,<sup>1</sup> as part of a 2-year programme announced by the UK Government at the April 2018 Commonwealth Heads of Government Meeting (CHOGM) in London<sup>2</sup> by the then UK Prime Minister, Theresa May.<sup>3</sup> A core focus of the 2-year programme is support for reform of colonial-era sexual offences laws that discriminate against women and girls and LGBT+ people, among others. As part of that support, the Trust—with the assistance of experts from around the Commonwealth—is producing research and information designed to inform, inspire and assist Commonwealth governments that are considering embarking on reform of these laws. The research is Commonwealth-focused, enabling member states to learn from other countries in the Commonwealth that have already successfully undertaken reforms. This research complements other independent research that the Trust is undertaking, including a series of practical in-depth case studies on the process of sexual offences law reform in different Commonwealth countries, which will be available on the Trust’s website as they are completed.<sup>4</sup>

This report and the information it contains is provided for general informational purposes only. It has been prepared as a work of comparative legal research only and does not represent legal advice in respect of the laws of the jurisdictions of the member countries of the Commonwealth. It does not purport to be complete or to apply to any particular factual or legal circumstances. It does not constitute, and must not be relied or acted upon as, legal advice.

Every effort has been made to reflect accurately each country’s laws based on legislation that was publicly available online or provided to the authors at the time of writing (January 2020) and, wherever possible, advice from legal experts in the countries covered in this report.

Please report any errors to the Human Dignity Trust at:  
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Photo credit: Mostafa Meraji

PART A:  
**About this Report**

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## OVERVIEW

This report builds on previous research commissioned by the Human Dignity Trust on good practice, human rights compliant sexual offences laws in the Commonwealth. It assesses this legislation in all fifty-three members of the Commonwealth against a series of criteria in the following areas of law:

- **Sexual assault**, including penetrative and non-penetrative sexual assaults;
- **Child sexual assault**, including certain problematic defences;
- **Disability and sexual offences**, including sexual assault laws that criminalise sexual activity with people with disability regardless of their capacity to consent to such activity; and
- **Consensual same-sex sexual activity**, including sodomy, buggery and gross indecency laws and discriminatory age of consent laws.

The report provides a snapshot view of some elements of national legislation in the four areas listed above. It is intended to highlight where a country is meeting or failing to meet good practice, human rights compliant standards for key aspects of its criminal law. It is not intended as a comprehensive survey of all criminal law on sexual offences in the Commonwealth.

The report focuses only on the criminal law as provided in **legislation** and does not evaluate the common law or judge-made law (with limited exceptions) or non-legislative instruments, such as subordinate legislation (e.g. regulations), policies and procedures, sentencing guidelines or judges' bench books which may be part of a sexual offences legal framework. Nor does it evaluate the implementation and enforcement of the legislation, which are as critical to good practice sexual offences laws as the legislation itself.

Earlier research commissioned by the Human Dignity Trust focused on defining good practice criteria for sexual offences legislation. These criteria, which are applied in modified form in this report, are based on international human rights law and states' obligations to implement that law at the national level, including through enacting domestic legislation to respect, protect and fulfil human rights. In the earlier research, these good practice criteria were applied to a small sample of Commonwealth countries from each region that demonstrated good practice in one or more areas of sexual offences laws within the scope of the research. The findings are reported in *Good Practice in Human Rights Compliant Sexual Offences Laws in the Commonwealth* (2019) (the *Good Practice Sexual Offences Report*). That report is intended to be used as a companion to this report. It is available online at <https://www.humandignitytrust.org>.

Importantly, the *Good Practice Sexual Offences Report* contains a detailed description of the good practice criteria and their sources in international human rights law, which is not repeated here. It also evaluates sexual offences laws against a wider range of good practice criteria than are applied in this report, and includes an assessment of how those laws are implemented in a small sample of case studies from across the Commonwealth regions. This more-in-depth approach was taken because the focus was on identifying examples of good practice sexual offences laws and included only a small sample of countries. However, in this report, the focus is on mapping the sexual offences laws of all members of the Commonwealth. In order to facilitate this, the criteria have been streamlined and only address certain key aspects of good practice sexual offences laws.

**Each of the criteria applied in the *Good Practice Sexual Offences Report* are critical to an effective, human rights compliant sexual offences legal regime and readers are referred to that report for information on the more inclusive list of good practice criteria.**

Good practice criteria for sexual assault laws that were assessed in the *Good Practice Sexual Offences Report* but are not included in this report address penalties, the defence of reasonable and honest but mistaken belief as to consent, special rules of procedure to protect complainants and witnesses, prohibiting marriage between the complainant and accused or compensation payments in lieu of criminal prosecution, and the need for independent and ongoing monitoring of the implementation of sexual assault legislation and to collect and publish sex-disaggregated data on sexual assault from all parts of the justice sector. Also excluded from assessment in this report are some aspects related to sexual offences laws and children and people with disability, as well as in relation to consensual same-sex sexual activity.

Some categories of sexual offences laws were outside the scope of the original research and are not included here. For example, laws criminalising sex work (prostitution), including same-sex sex work, and trafficking are not covered. Legislation criminalising incest, adultery, domestic and family violence, and female genital mutilation (FGM) are not covered. Laws criminalising LGBT+ public advocacy or cultural expression, and affectional, sexual or gender identity expression in public (for example, under public decency laws) are also outside the scope of this study. Each of these areas is an important area of study in its own right.

Age of consent laws of individual Commonwealth countries are not evaluated for good practice in this report. However, we describe key elements for good practice age of consent laws in Part B below because these laws are integral to child sexual offences and are used in some countries to criminalise consensual same-sex sexual activity between people of certain ages, areas of law which this report does address.

## How to use this Report

This report is intended primarily for use by government officials interested in reforming their country's sexual offences laws, law reform commissioners and experts, and advocates seeking reform in their country or region. Those working on sexual offences law reform in their country can use this report as a starting point in the law reform process.





The authors acknowledge that there is more than one way to draft good practice sexual offences legislation. This is demonstrated in the research in this and the other regional reports mapping these laws in the Commonwealth. This report is not intended to promote one approach over another, but rather to identify the fundamental, base-line criteria for good practice that any sexual offences law should meet.

However, the report does favour sexual offences legislation that sets out the law in detail to ensure that it is correctly applied by justice sector actors, including police and judges. For example, the report applies good practice criteria requiring that legislation define in detail non-consensual sexual acts, such as sexual or indecent assault, rather than relying on the courts to interpret the scope of the crime. In some jurisdictions, the case law interpreting such provisions and prosecutorial practice may be well-developed, nonetheless some national law reform bodies in these jurisdictions are recommending greater detail be included in the legislation.

The report is divided into three parts. Part A provides the overview and background to the research. Part B describes and briefly explains the good practice criteria used in the study. The criteria address key aspects of sexual offences laws and differ slightly in places from the criteria used in the *Good Practice Sexual Offences Report*.

Part C contains brief country reports and a checklist chart for every Commonwealth country in this region. It also contains a comparative chart for the region as a whole.

The country checklists show at a glance which aspects of a country's sexual offences laws that are addressed in this report meet the good practice standards and which ones fall short of those standards. Where necessary for clarification, short explanations are included. The checklists use the following designations:

-  **Green** – the law meets the criteria. An explanation may be provided.
-  **Orange** – the law partly meets the criteria. An explanation is provided.
-  **Red** – the law does not meet the criteria. An explanation may be provided.
-  **Blue** – Unknown. There was insufficient information available to assess the law against the criteria.

## TERMINOLOGY

The report uses a number of terms with the following meanings.

- **Accused** refers to the defendant in a criminal trial for sexual offences.
- **Complainant** refers to the victim/survivor of a sexual assault in a criminal trial.
- **Good practice** not 'best practice' is used in this report. Laws assessed as meeting the good practice criteria in this report meet fundamental international human rights standards. Good practice requires, at a minimum, that laws be compliant with these standards. As reform is an ongoing process and standards evolve over time, and there may be different models of legislation that are nonetheless all human rights compliant, we refer to 'good practice' laws rather than 'best-practice' laws.
- **LGBT+** refers to lesbian, gay, bisexual, transgender and other gender non-conforming people and includes people who do not identify with any gender.
- **Person with disability** includes any person, adult or child, with a permanent or temporary impairment that affects their cognitive, intellectual, hearing, vision, mobility or other capacities.
- **Sexual assault** includes all non-consensual penetrative sexual assaults, such as rape, unlawful 'sexual intercourse' or 'carnal knowledge', or however described in law, as well as non-penetrative sexual assaults such as touching or groping.
- **Same-sex sexual activity** refers to any and all sexual acts between people of the same sex or gender.
- **Victim/survivor** refers to any person who experiences sexual assault, including persons killed as a result of or as part of the sexual assault. The term recognises some victims/survivors prefer one term over the other to describe themselves.

## SEXUAL OFFENCES LAWS IN THE COMMONWEALTH AND THE NEED FOR REFORM

In each region of the Commonwealth there are some countries that have reformed their sexual offences laws. The extent of these reforms varies. Some have made significant changes, bringing their law into line with good practice standards and international human rights law. Others have only reformed elements of their law, leaving in place some outdated or discriminatory provisions. Several Commonwealth countries were developing reforms at the time of writing.

In many cases, expert local non-government organisations are the drivers of law reform. Drawing on their expertise, often as providers of essential services including as first responders to people who have been sexually assaulted or subject to discriminatory criminal prosecution, they have in many cases led decades-long campaigns for reform and provided essential expert advice on the development of good practice sexual offences laws. Legal development programmes funded by donor countries and agencies have bolstered these efforts and played a critical support role for reform of sexual offences laws in the Commonwealth.

However, as is clear from the findings in this report, the sexual offences laws of most members of the Commonwealth need urgent reform to remove discriminatory provisions and address outdated and prejudicial myths about sexual offences, perpetrators and victim/survivors.





Photo credit: Sharon Christina Rorvik

## **Examples of some common sexual offences laws in the Commonwealth that do not meet good practice**

- **Sexual assault** laws that:
  - limit penetrative sexual assault (e.g. rape) to penile penetration of a vagina;
  - exempt rape in marriage, only criminalise it in certain circumstances (e.g. when a husband uses force or threats of force to coerce his wife to have sex, or when the parties are separated or divorced), or set a lower penalty for marital rape compared with rape outside marriage; or
  - require corroboration of a complainant’s evidence;
- Laws that criminalise **consensual sexual activity with people with disability**, regardless of the capacity of the individual to freely consent;
- **Child sexual assault** laws that:
  - apply only to girls and fail to criminalise a wide range of acts;
  - permit the defence of consent to child sexual assault;
  - do not provide close-in-age exceptions or defences; and
  - set different ages of consent for girls and boys or for same and opposite-sex sexual activity;
- Laws that criminalise **consensual same-sex sexual activity** (however described in law);
- Laws that use **derogatory language** to describe people with disability (e.g. ‘imbecile’, ‘idiot’, ‘mental defective’) or same-sex sexual activity (e.g. ‘buggery’, ‘sodomy’, ‘unnatural acts’), or **moralistic language** for sexual assault (e.g. ‘defilement’, ‘indecent assault’, ‘carnal knowledge’).

**A country’s sexual offences laws, if they are non-discriminatory, properly implemented and enforced consistently and fairly, can play a vital role in protecting people, deterring the commission of offences and providing redress for those affected by violations. Good practice laws also:**

- **Support the rule of law in general;**
- **Build confidence in the formal justice system;**
- **Protect and guarantee fundamental human and constitutional rights;**
- **Eliminate stigma and abuse of vulnerable or marginalised groups; and**
- **Encourage positive shifts in attitude and behaviour at a societal and cultural level.**

On the other hand, sexual offences laws that are discriminatory or unfair, either on paper or in practice, are ineffective and harm people who are often already the most vulnerable in society, affecting all aspects of their lives. Such laws are:

- Inconsistent with national constitutional guarantees of equality, non-discrimination, dignity and privacy and with international and regional human rights norms; and
- Undermine the rule of law and the authority of the justice system.

They also perpetuate the commission of sexual offences and other violence, stigma and discrimination. For example, a discriminatory rape law will deter victim/survivors from coming forward and reporting the crime. Discriminatory rules of evidence can re-traumatise victim/survivors and can have the effect of denying them access to justice while the perpetrator is not held to account. Differential treatment of different victims of sexual abuse deny people equal protection of the law. Criminalisation of same-sex sexual activity exposes people to a range of very serious harms in violation of their fundamental rights.

Good practice laws are, therefore, essential for the well-being of individuals, their families, communities, broader society and the rule of law.

## GOOD PRACTICE LEGISLATION MUST BE IMPLEMENTED AND ENFORCED

Many factors, in addition to good legislation, determine whether a country's sexual offences laws represent good practice. In fact, the best legislation in the world will be ineffective at best and, at worst harmful if it is not well implemented. Good practice legislation requires consistent and non-discriminatory implementation and enforcement to be effective. It also requires the cooperation of other sectors, such as health, child protection, expert non-governmental organisations and service providers. The effective implementation of sexual offences laws therefore also rests on a cooperative multi-sectoral approach. Examples of some positive implementation efforts by Commonwealth countries can be found in the *Good Practice Sexual Offences Report*.

Analysis of implementation of sexual offences laws is outside the scope of this report which focuses on the legislation. Nonetheless, states are strongly encouraged to:

- **Review their legal framework as a whole**, to ensure it meets good practice, including aspects of sexual offences laws not addressed in this report and non-legislative instruments that provide important guidance to justice sector actors on the correct application of the law (e.g. bench books, sentencing guidelines, policies, police standard operating procedures);
- **Ensure that criminal law and procedure do not further victimise** sexual offences complainants or act as a deterrent for reporting such offences to police. Laws and rules may appear neutral, but they may have an unintended negative impact on the reporting and prosecution of sexual assault. For example, laws criminalising false reporting of crimes including rape, will deter victims from coming forward and expose them to criminal prosecution and further

victimisation. Laws criminalising adultery and consensual same-sex sexual activity have the same effect. A number of countries in the Commonwealth do not have procedural or evidential laws and court practices that provide for safe and protective circumstances for victim /complainants, including children, to be able to give evidence. These and other laws need to be reviewed as part of a sexual offences law reform process to ensure they are consistent with good practice standards and cannot be applied in a punitive or discriminatory manner;

- **Adopt a range of measures for the effective implementation of the law**, including providing adequate resourcing, targeted training of all justice sector actors (e.g. in the law, human rights, gender sensitivity, non-discrimination principles), consistent and complementary policies, laws, procedures and practices in corrections, health and education, access to justice programming, public education about legal rights, including human rights, and periodic, independent evaluation of the sexual offences legal framework; and
- **Consult and coordinate routinely** with a range of public agencies, experts and service providers, including from the non-government sector, that routinely interact with law enforcement and the justice sectors in the context of sexual offences (e.g. child protection, health, forensic pathology, corrections, legal aid and women's, children's, disability and LGBT+ non-governmental organisations, service providers and advocates).

## INTERNATIONAL & REGIONAL HUMAN RIGHTS LAW AND SEXUAL OFFENCES LEGISLATION

International human rights law requires states to take a range of measures, including enacting effective and non-discriminatory laws, to respect, protect and fulfil human rights. Discriminatory sexual offences laws are inconsistent with the foundational human rights principles of substantive equality and the respect for the inherent dignity of every person. They may also violate a range of other specific human rights norms including:

- equality before the law and equal protection of the law;
- freedom from discrimination in the enjoyment of all fundamental rights;
- respect for human dignity;
- right to privacy;
- protection of bodily integrity, including freedom from torture and cruel, inhuman or degrading treatment or punishment;
- protection of children from abuse and exploitation; and
- the rights of people with disability to autonomy, including sexual autonomy.

The specific legal obligations of states under international human rights law underlie the good practice criteria used in this report, which are derived from international and regional human rights treaties. For more information on applicable international legal norms, see the *Good Practice Sexual Offences Report*.

## United Nations human rights treaties<sup>5</sup>

- *International Covenant on Civil and Political Rights (ICCPR)*,
- *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*,
- *Convention on the Rights of the Child (CRC)*,
- *Convention on the Rights of Persons with Disabilities (CRPD)*,
- *Convention against Torture and Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*.

## Regional human rights treaties and declarations

- *The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*,<sup>6</sup>
- *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*,<sup>7</sup>
- *Council of Europe, Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*,<sup>8</sup>
- *Declarations on the Elimination of Violence against Women in the ASEAN Region*,<sup>9</sup> and
- *Pacific Leaders Gender Equality Declaration 2012*.<sup>10</sup>

## Other international instruments

- *Yogyakarta Principles +10, Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles*.<sup>11</sup>

Human rights treaty bodies and others have given general and country-specific commentary and guidance on how states can meet their treaty obligations, including by reforming their sexual offences laws, through general comments and recommendations and observations on individual countries as part of the periodic review process (e.g. the 'UPR'). For example, the CEDAW Committee has issued two General Recommendations (GR) on violence against women, GR 19 in 1992 and GR 35 in 2017,<sup>12</sup> and made numerous observations over many years on states' implementation of CEDAW at the national level.

Some agencies have further distilled the advice from the treaty bodies into practical guidance for states. For example, UN Women have published the guide, *Handbook for Legislation on Violence against Women (2012) (UN Handbook)* and its *Supplement on Harmful Practices*.<sup>13</sup> These explain in detail how to make national laws on violence



against women, including sexual violence, that would meet states' international human rights legal obligations. Although both Handbooks focus on violence against women, they are relevant to making laws on sexual assault against any person. It is therefore recommended that those interested in sexual offences law reform refer to the Handbooks.<sup>14</sup>

The Handbooks have informed several regional guidelines, such as the *Guidelines on Combating Sexual Violence and its Consequences in Africa (Niamey Guidelines)*,<sup>15</sup> adopted by the African Commission on Human and Peoples' Rights, and the *Pacific Island Forum Sexual Offences Model Provisions 2010*. The UN Handbooks have also informed the development of the good practice criteria used in this report.

**What is clear from the treaties, commentary and guidance is that good practice sexual offences laws must be non-discriminatory, protect an individual from harm, and respect their personal agency and bodily integrity. Where laws create criminal offences, they must also appropriately balance the competing interests of the rights of an accused person to a fair trial with the rights of a complainant. Laws that do not meet these fundamental standards will harm individuals affected by sexual offences and undermine the rule of law and the criminal justice system.**

PART B:

# About the Good Practice Criteria

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# 1. Sexual Assault

## Universal Criteria

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This Part briefly explains the criteria used in the country checklists in Part C below to assess whether a country's legislation on sexual assault and consensual same-sex sexual activity meet good practice. A 'traffic light' system is applied to the relevant law of each Commonwealth country to illustrate whether that law meets the good practice criteria explained in this Part.<sup>16</sup>

- ✔ **'Green light'** – the law fully meets the criteria. An explanation may be provided.
- **'Orange light'** – the law partly meets the criteria. An explanation is provided.
- ✘ **'Red light'** – the law does not meet the criteria. An explanation may be provided.
- ? **'Blue light'** – insufficient information to assess the law against the criteria.

The criteria are derived from international human rights law, including key international and regional human rights treaties, and their interpretation by expert bodies.

While the past half century has seen significant reforms to national rape and sexual assault laws, including in the Commonwealth, many countries retain archaic laws that are based on and perpetuate false, discriminatory and damaging myths about sexual assault and about victim/survivors and perpetrators.<sup>17</sup> These include exceptions for rape in marriage (women are the property of their husbands), requiring corroboration of a sexual assault complaint (women and girls lie about rape and sexual assault), defining rape only as penile penetration of a vagina (men and boys are not raped or sexually assaulted), allowing evidence of prior sexual conduct or reputation (only chaste women can be raped and sexually assaulted, the victim is to blame), assuming that young children can consent to sexual activity (willingness is the same as consent) and criminalising consensual sex with people with a disability (they don't understand the nature of the act, can never give free consent or should not be sexually active).

These and many other myths, and the legal rules that maintain them, cause harm and undermine the criminal justice system. They prevent or deter people from reporting sexual assault, expose survivors to re-traumatisation, shield perpetrators from justice and restrict or prevent access to justice for victim/survivors.<sup>18</sup> They blame the victim/survivor for what has happened and give excuses to the perpetrator for their actions and behaviour.



credit: Mary Y

## SEXUAL ASSAULT: THE CRITERIA EXPLAINED

### *Definition and scope of the crimes*

- a. **Sexual assault crimes are gender-neutral:** Definitions of sexual assault offences must not exclude any potential victim/survivor or perpetrator, regardless of sex, gender, sexual orientation, gender identity, age, disability status, marital status or any other status. All victim/survivors should have equal protection of the law.

In some Commonwealth countries penetrative sexual offences, such as rape and child rape, are conceived in law (and in common understanding) as a crime that can only be committed by a male against a female. Accordingly, in many countries rape is limited to sexual intercourse and the penetration of a vagina by a penis. Excluding the rape of males is discriminatory and not good practice. Some countries that maintain 'buggery' and 'sodomy' laws may criminalise non-consensual anal sex under such provisions. However, good practice requires the repeal of these crimes and for anal 'rape' to be included in the general sexual assault provisions, for example as 'rape' and 'sexual assault', and in child sexual offences. All of these crimes should be gender-neutral.

Meeting this good practice criteria does not preclude including additional specific offences of violence against women and girls, for example in acknowledgement that they are overwhelmingly the target of many forms of violence, including sexual assault and domestic violence. This is an approach a small number of countries have taken.

- b. **Marital rape and sexual assault are crimes:** The legislation should expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.

'Marital rape immunity' remains in the law of some Commonwealth jurisdictions either as a blanket exemption or as a defence in limited circumstances, such as if force is used or the parties are judicially separated or divorced. Many countries simply do not address marital rape in their legislation at all.

Marital rape immunity is based on the outdated belief that wives cannot be raped because at marriage they consented to all sexual acts with their husband. This view is discriminatory on the grounds of sex and marital status and denies women their fundamental right to autonomy and bodily integrity and to be free from torture and cruel, inhuman or degrading treatment. It treats wives as male property.

The UK House of Lords overturned an old common law rule exempting husbands from criminal liability for raping their wives (*R v R*).<sup>19</sup> Many countries around the world, including in the Commonwealth, have abolished this exemption legislatively or by jurisprudence. The common law and national case law are not assessed in this report and to meet the good practice standards applied here, legislation should state that marital rape and sexual assault, including of married children, are crimes and that there is no exception for, or defence of marriage to these offences.

- c. **Free and voluntary consent is required:** The legislation should expressly define consent to require free and voluntary agreement to sexual activity. The law should also explicitly recognise that there are circumstances in which genuine consent cannot be given. These circumstances should be listed in the legislation in a non-exhaustive list.

Most sexual assault laws in the Commonwealth do not define ‘consent’ at all, merely stating that rape is sexual intercourse without consent or with the use or threat of force, or when a person was deceived into sexual intercourse (the perpetrator impersonates the victim/survivor’s husband), or when the victim/survivor was incapable of understanding the nature of the act due to their age or impairment. Some countries include a longer list of circumstances where there can be no consent including for example:

- where the perpetrator took advantage of, or created a coercive situation, such as use or threat of force or the exercise of coercive control in cases of domestic violence or unlawful detention;
- where the victim/survivor cannot give free and voluntary consent because they were a child, asleep, unconscious, physically immobilised or restrained, incapacitated by alcohol or drugs, or by a temporary or permanent illness, disability or impairment that prevents them from giving free and voluntary consent or with limited or no capacity to communicate their consent or non-consent;
- where the perpetrator was in a position of trust or authority in relation to the victim/survivor, or the victim/survivor was under the care and/or control of the perpetrator.

Where such lists exist in the law, they are not evaluated.

This report does not address the defence of reasonable or honest but mistaken belief as to consent. This defence is an important safeguard of the rights of an accused person. However, good practice requires the rights of the accused to be balanced with the rights of a complainant. For this reason, where this defence is available, sexual offences laws should expressly require a defendant to show they took reasonable steps to confirm that the person was consenting to the sexual activity. This defence should not be available in circumstances in which the law presumes consent cannot be given, such as those outlined above.

- d. **Evidence of resistance is not required:** The legislation should make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It should also make clear that consent cannot be inferred from a complainant’s silence or submission during the assault.



Requiring proof of resistance as evidence that there was no consent is based on discriminatory and erroneous myths, including that ‘real rape’ always involves force, victim/survivors always try to fight off their attacker and that women lie about rape and other sexual assaults. There are many circumstances in which genuine consent cannot be given and there are many reasons why a victim/survivor may not physically resist their attacker or might appear to submit to sexual assault even in the absence of the use or threat of force.

Some Commonwealth countries have made clear in their law that evidence of resistance by the victim/survivor is not required and that submission or silence is not consent. This approach fully meets this criterion. Defining consent as free and voluntary agreement, with a list of situations in which there can be no consent, does not, on its own, meet this criterion because evidence of resistance to prove that there was no such agreement may still be required by a court. In several Commonwealth countries, there is an express requirement for evidence of force or violence to prove there was no consent. This is not good practice.

- e. **All non-consensual sexual acts involving penetration are offences:** Good practice sexual assault laws must be broadly defined and cover non-consensual sexual penetration of any orifice (mouth, vagina, anus) by any body part (not limited to a penis) or object.

Laws on rape and other penetrative sexual offences in many Commonwealth countries continue to define the crime as the penile penetration of a vagina. This is not good practice as it excludes rape of males and other ways in which non-consensual penetrative sexual conduct occurs, as well as same-sex penetrative sexual assaults. This approach also treats vaginal rape as more serious than other forms of penetrative sexual assaults, which does not reflect the harm caused to the victim/survivor.

Some jurisdictions criminalise rape as the non-consensual penile penetration of a vagina and cover other forms of non-consensual sexual penetration, including of males, as part of other sexual offences, such as indecent or sexual assault. These jurisdictions may satisfy this criterion if they criminalise all such conduct equally, including prescribing the same penalty. However, if these offences are not treated as seriously with appropriate penalties, they may not meet the good practice criteria. Better practice would be to make all crimes of penetrative sexual assault gender-neutral and object and orifice inclusive. Laws criminalising non-consensual anal sex as ‘buggery’ or ‘sodomy’ are not good practice either. These crimes should be repealed and anal rape of any person (male or female) should be covered under gender-neutral sexual assault provisions and child sexual offences.

- f. **All non-penetrative, non-consensual physical sexual acts are criminal offences:** Good practice sexual assault laws must be defined broadly to include all kinds of non-penetrative assaults of a sexual nature.

Contrary to good practice, many sexual offences laws in the Commonwealth do not define these offences, which are commonly called ‘indecent’ acts or assaults. Such laws may be interpreted by local courts to cover the acts in question, but this is not transparent or clear and may be more likely to lead to a narrow interpretation, excluding a range of assaults of a sexual nature from the criminal law. These offences should be clearly and broadly defined in legislation to include, at least, non-consensual touching, groping or physical contact of a sexual nature, whether over or under clothes, for example of genitals, breasts or anus using any body part (including semen) or object, as well as using genitals to touch any part of the body. They should also include any act of sexual stimulation and forcing a person to perform sexual acts on themselves or others, or to watch such acts.

The use of the term ‘indecent’ act or assault, while a common feature of sexual offences laws in Commonwealth jurisdictions, is not good practice because it treats the crime as a moral attack rather than as a violent assault. These crimes should be re-named and characterised as assaults of a sexual nature.

### **Rules of evidence and procedure**

- g. **No corroboration required:** Legislation setting out rules of evidence in criminal proceedings for sexual assault should state that no corroboration by a third party of the complainant’s testimony is required.

The rule on corroboration is a common law exception to the hearsay rule imported into many Commonwealth countries by the British colonists. The rule requires a third party to corroborate a complaint of sexual assault. The rule is clearly discriminatory. It is often not applicable to other criminal offences, including those that occur in private, and it is based on the damaging and false myth that women and girls lie about rape and other sexual assault.

In a case on appeal from Grenada, the Privy Council held that there is no requirement at common law for corroboration in sexual assault cases and that it was up to the judge to determine if it was necessary to warn the jury about the reliability of any uncorroborated evidence (*R v Gilbert* (2002) 61 WIR 174). A number of courts around the Commonwealth have made similar findings and some Commonwealth countries have expressly abolished the rule in their legislation.

Common law rules of evidence, including on corroboration of sexual offences, are not assessed in this report. Where legislation does not expressly exclude corroboration in relation to sexual offences, regardless of the common law position in that country, the law does not meet this good practice criterion. Good practice sexual offences laws for the purpose of this report require its express abolition by legislation.

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## The harmful impact of the corroboration rule

[The corroboration rule's] effect has been to place victims of sexual offences in a special category of suspect witnesses ... It has given accused ... a protection which does not exist in other cases of serious criminality, and it almost certainly has had the effect, in many instances, of deterring rape victims from reporting offences committed against them, or from co-operating in the prosecution of offenders.

Attempts have been made, from time to time, to justify the rule by reference to a wide range of reasons, including a supposed tendency in women to engage in fantasy, to be fickle or spiteful in sexual relationships, to be prone to sexual neurosis, or to be unwilling to admit to consent out of shame.

However forcefully these reasons are propounded, along with the associated rape myths ... we consider that they have reflected a flawed understanding of the world, they have been unfairly demeaning of women, and they have been discredited by law makers, in more recent times.

— *Fiji Court of Appeal – Balelala v State [2004] FJCA 49*

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- h. **Prior sexual conduct is inadmissible and irrelevant:** Legislation should provide a presumption that evidence of the prior sexual conduct of the complainant with the accused or another person, as well as their 'sexual reputation', is inadmissible or only admissible with prior leave of the court and with strict safeguards.

Good practice on this point requires balancing the rights of an accused person to a fair trial with the rights of a complainant to equal protection of the law, privacy and dignity. Evidence of a complainant's prior sexual history is generally irrelevant, yet it has been and is often allowed to discredit the complainant herself, as well as her evidence that she did not consent to the sexual activity that is the subject of the criminal complaint. Providing that such evidence is inadmissible protects complainants from irrelevant questioning that is often traumatising and which violates their privacy. Allowing evidence of a complainant's prior sexual conduct or sexual reputation is not good practice as it allows an inference of consent to be drawn from irrelevant factors.

A small number of Commonwealth countries have excluded such evidence altogether, while others may allow it with the leave of the court in limited circumstances, such as when it relates directly to the sexual activity that is the subject of the charges and has a very high probative value that outweighs any potential prejudice to the proper administration of justice or the complainant's personal dignity and right to privacy. Depending on the extent to which such evidence is allowed and which safeguards are put in place in the law, this approach may meet good practice standards.



## **Crimes of power and violence not morality**

- i. **Terminology in sexual assault laws is legal and not moralistic:** Sexual offences provisions should use neutral and precise legal terminology that is not moralistic and does not perpetuate discriminatory stereotypes.

Use of terms such as ‘defilement’, ‘insulting modesty’, ‘offences against morality’ or ‘honour’ and ‘indecent assault’ are used to describe sexual offences in the criminal laws of many Commonwealth countries. For example, the crime of ‘defilement’ is an archaic concept meaning ‘to pollute’ or ‘to sully’ and, in the context of sexual offences, usually refers to the sexual assault of girls. It is a discriminatory term as it indicates that girls are ‘spoilt’ or ‘damaged’ through the loss of their virginity. Properly viewed, the rape and sexual assault of any person are attacks against their physical and mental integrity and sexual autonomy. They are unrelated to the ‘modesty’ or ‘honour’ of the victim/survivor or their family.



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**Sexual violence has often been addressed in the problematic framework of morality, public decency and honour, and as a crime against the family or society, rather than a violation of an individual’s bodily integrity.**

— *United Nations Handbook on Legislation for Violence Against Women 2012, p24*

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## 2. Sexual Assault

### Additional Criteria in Relation to Children

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**The general criteria outlined above apply equally in relation to children. The following are additional criteria with specific application to the particular situation of children.**

All Commonwealth countries have specific child sexual assault offences. However, the laws of many are inadequate and discriminatory and do not meet good practice standards. For example, many countries do not criminalise a wide range of child sexual assault, limiting protection only to unlawful sexual intercourse with children and not expressly including offences such as grooming. Some countries only criminalise sexual activity with girls, which is discriminatory on the grounds of sex and not good practice. Even where countries have child sexual assault offences in their legislation, they are often undermined by allowing the defence of consent and not providing appropriate close-in-age defences.

Children under the age of consent should be presumed in law not to be able to consent to sexual activity (except in close-in-age situations), including in marriage. Good practice child sexual assault laws should allow 'close-in-age' defences to protect children and young people under the age of consent from criminal prosecution for engaging in consensual sexual activity with their peers.

Many Commonwealth countries provide for a defence of reasonable and honest but mistaken belief as to the age of a child. This defence is not assessed in this report. While this defence is an important safeguard of the rights of an accused person, good practice requires a balance between the rights of the accused and the rights of a complainant. For this reason, where this defence is available, sexual offences legislation should expressly require a defendant to show they took reasonable steps to confirm that the person was over the age of consent. In order to protect children, it must include an objective test to determine if the accused person's belief as to the age of the complainant was reasonable in the circumstances.

## *Age of consent laws and close-in-age defences*

Laws governing the age at which a person can consent to sexual activity underlie all child sexual offences and are also relevant to laws on minimum age for marriage. This report does not assess the age of consent laws of individual Commonwealth countries or their minimum marriage age. It does, however, note the age of consent (where one exists) in each country and evaluates whether that law is discriminatory on the basis of sex, gender, sexual orientation or gender identity.

Practice on age of consent to sexual activity varies around the world, including in the Commonwealth. Most Commonwealth countries set the age of consent for opposite-sex sexual activity at 16 years with some opting for a higher age of 18 (e.g. Rwanda) and some a lower age, for example 14 years (e.g. Namibia). Some countries provide for a lower age of consent for girls than for boys (e.g. Bangladesh). Some countries also discriminate in their age of consent law on the basis of the kind of sexual activity or whether it is same-sex or opposite-sex sexual activity (e.g. Bahamas). All such distinctions are discriminatory and do not meet good practice standards.

Under international law, children and adolescents have rights as well as evolving capacities to make decisions that affect themselves. Good practice age of consent laws, therefore, strike the right balance between protecting the rights of children and young people to be free from exploitation and other harms, including sexual abuse, and protecting their other fundamental rights, including to privacy and healthy sexual development. This is the approach also recommended by the UN Committee on the Rights of the Child.<sup>20</sup>

It follows that good practice age of consent laws must be non-discriminatory, clearly set out in the law and not allow exceptions for child marriage or on the basis of culture or religion. They must be set neither too low nor too high. A low age of consent exposes children, and especially girls, to sexual abuse and child marriage and undermines the child sexual offences legal framework. Setting the age of consent too high can have the effect of stigmatising and criminalising adolescents who engage in consensual sexual activity with each other and may drive child marriage.



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**In some societies, parents' desire to preserve their daughters' "sexual purity" prior to marriage may drive early marriage. In many societies, adolescents may feel the only way they can have sex—and access sexual and reproductive health information and services—is by being married, which again, may drive early marriage. It also increases barriers to accessing sexual and reproductive health services, further endangering young people.<sup>21</sup>**

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Providing for close-in-age defences in the legislation is also essential to prevent the criminalisation and stigmatisation of genuinely consensual sexual activity between peers, where there is a small gap in age between them (e.g. 2-5 years) and where one or both are under the age of consent.

However, there should be no close-in-age defence if there is a relationship of trust, authority, supervision or dependence between the parties (e.g. teacher, care-giver, employer, employee in an institution where the young person lives or studies, sports coach, religious leader). The law should also make clear that there is no such defence even if the older party is also a child but uses threats, coercion or pressure.<sup>22</sup> Excluding close-in-age defences in these situations addresses potential power imbalances between the parties and helps to protect children from exploitation or abuse by another child or young person.

This report does not evaluate the close-in-age laws of individual Commonwealth countries, but it does consider the availability of this defence in the assessment of child sexual assault provisions against the good practice criteria.

**International human rights law does not specify a minimum age of consent to sexual activity. However, based on the principles under the *Convention on the Rights of the Child* and other human rights standards, it is recommended that the age of consent be set at between 16-18 years of age, provided that appropriate close-in-age defences are also in place.**

## THE CRITERIA EXPLAINED

### *Definition and scope of sexual offences against children*

- a. **There are specific child sexual assault offences:** Sexual offences legislation should include specific child sexual assault offences, including penetrative and non-penetrative sexual offences.

Children and young people face particular vulnerabilities to sexual abuse and exploitation due to their age, their social status and their dependency on adults. Good practice laws must criminalise specific penetrative and non-penetrative sexual offences against all children and young people, including for example, rape, sexual assault, including touching and groping or other contact of a sexual nature, as well as grooming and sexual communication with a child. Other specific child offences that are not addressed in this report should also be explicitly provided for, including child sexual exploitation, trafficking, persistent child sexual abuse, FGM and voyeurism.

The legislation must provide appropriate close-in-age defences or exceptions for consensual sexual activity between young people when one or both of them is under the age of consent and they are close-in-age. However, this defence should be excluded if there is a relationship of trust, authority or dependency between the child and the other person, or any other coercion, exploitation or pressure of the child.

- b. **Child sexual assault offences are gender-neutral:** Child sexual assault offences should be gender-neutral. Any child, regardless of sex or gender, sexual orientation or gender identity, or any other characteristic, can be raped or otherwise sexually assaulted. The definitions of crimes should not exclude any potential victim/survivor.

Some countries still explicitly limit child sexual assaults to girls, for example in 'defilement'-type offences. This approach is discriminatory on the basis of sex. It is based on, and perpetuates the false myth that only females can be raped or subjected to other sexual assaults. It denies male children protection from abuse while protecting abusers. Child sexual assault laws that are not gender-neutral also violate fundamental rights under many human rights treaties, including the *Convention on the Rights of the Child*, to which every Commonwealth country is a party.

- c. **There is no defence of consent to child sexual assault offences (other than close-in-age defences):** The defence of consent should be expressly excluded from child sexual assault laws (e.g. 'statutory rape').

Children under the age of consent should be presumed in law not to be able to consent to sexual activity except when close-in-age.



***Persons with disabilities must not be denied the opportunity to experience their sexuality, have sexual relationships and experience parenthood...***

— United Nations Standard Rules for the Equalization of Opportunities for Persons with Disabilities, Rule 9

## 3. Sexual Assault

### Additional Criteria in Relation to People with Disability

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**The general criteria and the criteria relating to child sexual offences outlined above apply equally in relation to all persons (including children) with disability. The following are additional criteria developed to have specific application to persons with disability.**

Sexual assault laws in many countries across the world, including in the Commonwealth, reflect outdated and prejudiced attitudes towards people with disability. This is evident in the common use of derogatory language in sexual offences laws to describe people with disability, for example, 'idiot', 'imbecile', 'defective' or 'subnormal'. It is also evident in the underlying assumptions reflected in the law that people with disability:<sup>23</sup>

- never have any autonomy and so cannot consent to sexual activity,
- always are incapable of understanding the nature of sex,
- should not be sexually active, and
- are inherently vulnerable to violence and abuse, rather than made vulnerable by the social and structural systems that constrain and control their lives and fail to support them to exercise their legal capacity.

A common response in sexual offences laws to these assumptions is to criminalise all sexual activity with a person with a disability (usually limited to cognitive or intellectual disability or mental illness), in an effort to protect them from sexual exploitation and abuse.

These assumptions are based on negative and ill-informed stereotypes about people with these types of disability. They are inconsistent with human rights law to the extent that they undermine or deny people with disability their rights to equality and non-discrimination, to personal autonomy, and to equality before the law, including the right to make decisions about issues that affect them. In other words, to exercise their 'legal capacity'.

At the same time, the international human rights framework requires that countries protect the right of people with disability, like everyone else, to be free from violence. Global data consistently show that people with disability face greater risk of all forms of violence than people without disability.<sup>24</sup> The data also show that the risk is particularly acute for women and girls with disability, and people with disability whose day-to-day lives are managed or constrained by others, such as in institutional or congregate care settings, or in heavily



controlled family settings. These risks are exacerbated by the invisibility experienced by many people with disability, both through attitudes that seek to hide disability or those that seek to be overly protective.

Good practice sexual offences laws should be disability-neutral. They should provide the same regime for determining whether a person has freely and voluntarily consented to sexual activity for people with disability and people without disability. Similarly, situations that should be recognised in the law when genuine consent cannot be given, such as incapacity or abuse of trust or authority, should apply to all people. Any person, whether they are a person with disability or not can be affected by such factors temporarily, permanently or intermittently.

## THE CRITERIA EXPLAINED

### *Sexual offences laws treat people with disability equally*

- a. **Consensual sexual activity with a person who has a disability is not an offence:** Consensual sexual activity should not be criminalised solely on the basis that one or more of the participants is a person with disability. Sexual assault laws should not assume that all or any persons with disability are incapable of freely and voluntarily agreeing to sexual activity or understanding the nature of it.

The test for consensual sexual activity with a person with a disability should be the same as for a person without disability – the giving of free and voluntary agreement. Similarly, situations recognised in the law in which genuine consent cannot be given, such as actual incapacity or abuse of trust or authority, such as in a care facility, should apply to all people. Any person, whether they are a person with disability or not, can lack capacity to consent freely and voluntarily either temporarily or permanently. The legislation should not impose additional protective measures merely on the basis of a person's disability and regardless of whether they have the capacity to give, and have given, free and voluntary consent to the sexual activity. However, it may be consistent with good practice to provide for higher penalties for sexual offences against people with disability where there is no genuine consent or to provide that abuse of a trust or care relationship is an aggravating factor to be considered in sentencing. Criminalising all sexual activity with people with disability, however, is paternalistic and violates a person's fundamental rights to legal capacity, equality and non-discrimination.

- b. **No discriminatory, derogatory or stigmatising language is used:** Discriminatory, derogatory or stigmatising language must not be used in sexual offences laws to refer to people with disability. These include terms such as 'idiots', 'imbeciles', 'mentally subnormal', 'mental defective' and 'handicapped'. Good practice laws should refer to 'people', 'persons' or 'person' with disability, in accordance with the language of the *UN Convention on the Rights of Persons with Disabilities*.

# 4. Consensual Same-Sex Sexual Activity

## Criteria

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Every human population includes members who are same-sex attracted and who find happiness and fulfilment in an intimate, emotional and sexual relationship with another person of the same sex. It is widely understood and accepted in the international legal and scientific communities that this is a normal variant of human sexuality. However, there is a long history, particularly across the Commonwealth, and in certain other countries in the world, of criminalising consensual same-sex sexual activity. States use a range of terms for these offences, such as buggery, sodomy, unnatural acts, gross indecency, same-sex sexual relations, homosexual sex, lesbianism and acts against the order of nature. Often these acts are dealt with in the same provision as the crime of bestiality, which exacerbates the stigmatising impact of the crimes. In addition to criminalising consensual same-sex sexual activity or activity that is more associated with same-sex attracted people, some countries also criminalise any public display of same-sex relationships directly or indirectly (e.g. Nigeria).

In the Commonwealth, the numbers are well known: as of October 2019, 35 of the 53 member states (including associated jurisdictions) still criminalise consensual sexual activity between people of the same sex.<sup>26</sup> While these figures are stark and highlight the need for urgent action on legislative reform across the Commonwealth, some progress has been made with national courts finding criminalisation to be unconstitutional and striking down the offending provisions in the criminal law, for example, in South Africa and Fiji and more recently in Belize, Botswana, India and Trinidad and Tobago. Legislatures in a number of Commonwealth countries have also taken steps recently to repeal these laws, including in Mozambique, Nauru and Seychelles.

There is extensive literature and an ever-growing body of empirical research showing that criminalising consensual same-sex activity causes a wide range of serious, identifiable harms, including murder, sexual violence, discrimination in all spheres of life, social exclusion, harassment and unlawful detention, removal of children from and denial of custody of children to their parents, poor health, such as depression, suicide and self-harm and HIV/AIDS, and limited access to basic services, including health, education, housing and legal services.

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**A clear link exists between the criminalization of lesbian, gay, bisexual and transgender persons and homophobic and transphobic hate crimes, police abuse, community and family violence and stigmatization...**

**[Criminalising] laws foster a climate in which violence against lesbian, gay, bisexual and transgender persons by both State and non-State actors is condoned and met with impunity.**

— *UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016*

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Criminalisation of consensual same-sex sexual activity is also contrary to international human rights law and the fundamental principles of equality, non-discrimination and the right to privacy and leads to violations of many other fundamental human rights. This has been confirmed, for example, by the European Court of Human Rights, which has found that laws criminalising same-sex sexual activity violate the right to privacy under the *European Convention on Human Rights*.<sup>26</sup> The UN Human Rights Committee has also been very clear that human rights law prohibits criminalisation of consensual same-sex sexual activity. For example, in its landmark 1994 decision in *Toonen v Australia*,<sup>27</sup> the Committee said that a state law in Australia (Tasmania) criminalising consensual sexual activity between men violated the right to privacy and non-discrimination on ground of sex under the *ICCPR*. It said that the law violated human rights even though it was not enforced.

Since *Toonen*, other UN treaty bodies have repeatedly urged states to reform their laws criminalising consensual same-sex conduct because they violate fundamental human rights norms.<sup>28</sup>

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**States that criminalize consensual homosexual acts are in breach of international human rights law since these laws, by their mere existence, violate the rights to privacy and non-discrimination.**

— *UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 2016*

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Reinforcing the impact of these decisions have been a number of important declarations, including:

- the African Commission on Human and Peoples' Rights *Resolution 275 on protection against violence on the grounds of sexual orientation and gender identity*, which condemns human rights violations, including arbitrary imprisonment and other forms of persecution based on sexual orientation or gender identity;<sup>29</sup>

- the 2016 report of the former UN Special Rapporteur on Torture, Juan Mendez, linking the criminalisation of same-sex activity to increased violence against LGBT+ people; and
- the *Yogyakarta Principles plus 10* that make an unequivocal case for decriminalisation.<sup>30</sup>

In some countries in the Commonwealth, these crimes are expressed in gender-neutral terms and apply both to consensual and non-consensual acts. This is not good practice. These offences should be repealed and all non-consensual sexual acts, including anal 'rape' of any person, should be criminalised as part of gender-neutral sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences.

Some countries that have repealed their offences on same-sex sexual activity maintain or create a different age of consent for same-sex sexual activity or sexual activity that is more associated with same-sex attracted people, such as anal sex. Not only is this discriminatory, it means the country has not fully decriminalised. It also exposes people engaging in such conduct to the same harms listed above. Therefore, it is not human rights compliant nor good practice.

## THE CRITERIA EXPLAINED

### *Same-sex sexual activity is not a crime*

- a. **Consensual same-sex sexual activity is not a crime:** Consensual same-sex sexual activity between people who are above the age of consent should not be criminalised. The following offences, or any with similar effect, should be abolished: indecency (or gross indecency) between people of the same sex, unnatural acts, carnal knowledge/intercourse against the order of nature, buggery, sodomy, homosexuality, lesbianism, same-sex sexual relations, fellatio, and cunnilingus.

Some Commonwealth countries have repealed these offences through legislation. In others, local courts have found these offences to be unconstitutional, striking down the offending provisions in the criminal law. Both approaches are assessed in the country reports in Part C.

- b. **No discriminatory, derogatory or stigmatising language is used:** Sexual offences laws should not use language that is discriminatory, derogatory or stigmatising of LGBT+ people, including terms such as: buggery, sodomy, intercourse against the order of nature, indecency between male/female persons, abominable crime, or the equating of same-sex sexual activity with bestiality.
- c. **No discriminatory age of consent laws where consensual same-sex sexual activity is not a crime:** The age at which a person can legally consent to sexual activity should be the same for everyone regardless of the kind of sexual activity and whether it involves same-sex or opposite-sex participants.

Maintaining a higher age of consent for same-sex sexual activity after repeal of the associated criminal offences is discriminatory, does not achieve full decriminalisation and is not good practice.

Close-in-age defences and exceptions should be available to prevent criminalising children and young people who engage in genuinely consensual same-sex sexual activity with their peers when one or both of them is under the age of consent.

PART C:  
**Country Checklists**

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# ASIA





The Asian region of the Commonwealth comprises seven countries. Several countries in this region have multiple legal systems, including Sharia or Islamic law, which may include sexual offences. Applicable common law and case law may also be relevant. These laws have not been assessed in this report as they are outside its scope, with the exception of Brunei Darussalam, which has legislated Sharia sexual offences laws.

One of the reasons for excluding these sources of law from the analysis was their limited accessibility. Also, it was decided to focus on statutory sexual offences law in the first instance, in order to prompt and assist legal reform processes. The report is not a comprehensive survey of all sexual offences laws in force in the Commonwealth countries of the region. It is intended to provide a snapshot view of whether certain key elements of sexual offences law in national legislation meet good practice standards that are human rights compliant. It is hoped that the report will be a helpful *starting point* for the thorough analysis of all sexual offences laws that states will need to undertake as part of any law reform process. This would necessarily include analysis of parallel or complementary legal frameworks on sexual offences, including the common law, as well as customary or religious law, where these apply.

Outdated sexual offences laws are still in force across the region, at least in some of the areas assessed in this report. A small number of countries in the region have made some important reforms, for example overhauling child sexual offences (e.g. Malaysia), criminalising marital rape (e.g. Singapore) and expressly stating in the law that evidence of resistance is not required to prove absence of consent to sexual acts (e.g. Sri Lanka).

In this region India is the only country where consensual same-sex sexual activity is no longer a crime, after the Indian Supreme Court found this to be unconstitutional in 2018.

For many countries in this region, there is a large gap between good practice sexual offences legislation and the law in force. For example, several countries prescribe corporal punishment, whipping, for sexual offences (e.g. Malaysia) and the laws of two countries provide for the death penalty as a possible punishment for sexual assaults (Brunei Darussalam, Malaysia), contrary to good practice. With one exception (Singapore), all the countries in this region retain a marital exemption for rape in at least some circumstances. Allowing a defence that effectively makes it impossible to prosecute rape or other sexual assault in cases where the victim is married to the accused is discriminatory on the grounds of marital status and of sex. It also conflicts with other human rights and may be contrary to constitutional equality guarantees. The sexual offences laws of one country, Sri Lanka, also provide a marital exemption for child sexual assault and lowers the age of consent from 16 to 12 years for married children.

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***There is an urgent need for widespread and comprehensive reform of sexual offences laws in this region.***

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Although the penalties regime for sexual offences is not assessed in this report, all penalties need to be reviewed, along with any sentencing guidelines to judges, as part of any sexual offences law reform process. Good practice requires penalties to match the gravity

of the crimes, provide for aggravating factors to be taken into account in sentencing, not be discriminatory, and exclude the death penalty and corporal punishment.

Implementation of sexual offences laws is also not assessed in this report. It is noted, however, that in many countries in the region, effective implementation of the law is a significant challenge due to a number of factors, including:

- lack of financial and human resources;
- geographical challenges;
- lack of training, including in gender sensitivity, among justice sector actors; and
- entrenched cultural and religious beliefs.

Every Commonwealth country in this region has ratified at least some UN human rights treaties of most relevance to the subject matter of this report, namely the *Convention on the Elimination of All Forms of Discrimination against Women*, the *Convention on the Rights of the Child*, and the *Convention on the Rights of Persons with Disabilities*. However, not every Commonwealth country in this region has ratified the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* or the *International Covenant on Civil and Political Rights*.

Every effort has been made to reflect accurately each country's laws based on legislation that was publicly available online or provided to the authors at the time of writing and, wherever possible, advice from legal experts in the countries covered in this report.





Photo credit: Meng Chang

# BANGLADESH





**Bangladesh's sexual offences laws are found in the *Penal Code 1860 (as amended) (PC)* and the *Prevention of Oppression Against Women and Children Act 1995 (as amended) (POWC)*. The *Evidence Act 1872 (EA)* contains the rules of evidence that pertain to sexual offences. Neither the common law nor relevant case law is assessed in this report. Bangladesh does not have comprehensive laws to address sexual violence.**

While there have been some reforms in this area, most recently in 2003 to the *POWC*, many of the sexual assault provisions assessed in this report do not meet good practice. These include, for example the definition of rape which is limited to penile penetration and does not take into account the full range of sexual acts that can violate the sexual integrity of either female or male victims. The law does not define consent to sexual activity as free and voluntary agreement by a person, does not specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent, or specify that evidence of a complainant's prior sexual conduct is inadmissible.

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***There is only one specific child sexual assault offence and it applies only to girls under 14. The age of consent for opposite-sex sexual activity in Bangladesh is 14 years for girls. There is no minimum age of consent for boys in the legislation, which is not good practice and is discriminatory on the ground of sex.***

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Bangladesh criminalises consensual same-sex sexual activity between males and the *PC* uses language that is discriminatory and stigmatising such as 'carnal intercourse against the order of nature'. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Bangladesh is a state party to relevant international human rights treaties, including the *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights*.

# 1 Sexual Assault



## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

### Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral**   
*Comment: The crime of 'rape' relates only to women and children - 'whoever commits rape with a woman or child' (s 9 POWC).*
- b **Marital rape and sexual assault are crimes**   
*Comment: The legislation states that rape is only an offence 'without lawful marriage' unless the spouse is under 14 years (s 9 POWC). 'Sexual oppression is 'illegal' touching or assault or indecent gesture excluding married persons (s 10 POWC).*
- c **Free and voluntary consent is required**   
*Comment: There is no express definition of consent requiring free and voluntary consent to be given.*
- d **Evidence of resistance is not required**   
*Comment: The law is silent and does not specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not specify that consent cannot be inferred from a complainant's silence or submission during the assault.*
- e **All non-consensual sexual acts involving penetration are offences**   
*Comment: The legislation does not specify that all acts of penetration, including of all orifices by any body part or object, are crimes. These acts may be covered by other offences, but this is not explicit in the legislation and they may be treated less seriously.*
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences**   
*Comment: The POWC has a criminal offence of 'sexual oppression' which includes sexual touching with any body organ or substance, sexual assault, and indecent gestures (s 10 POWC). The PC has an offence of assaulting or using 'criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty' (s 354 PC). These offences apply only to females. There are no equivalent offences for sexual assaults of males.*

### Rules of evidence and procedure

- g **No corroboration required**   
*Comment: Not expressly excluded in legislation. Common law rules are not assessed.*
- h **Prior sexual conduct is inadmissible and irrelevant**   
*Comment: The legislation states that a witness may be impeached: 'when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character' (155(4) EA).*

### Crimes of power and violence not morality




- i **Terminology in sexual assault laws is legal and not moralistic**   
*Comment: The POWC uses the terms 'indecent gesture', and the PC uses the term 'outrage her modesty'.*

## 2 Sexual Assault

### Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown



#### Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences**   
*Comment: There is only one child sexual assault offence of sexual intercourse with a 'woman' under 14 (s 9 POWC). There are no close-in-age defences.*
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

## 3 Sexual Assault

### Additional Criteria in Relation to People with Disability

#### Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

## 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime**   
*Comment: The legislation states that 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal' commits a crime (s 377 PC).*
- b **No discriminatory, derogatory or stigmatising language is used**   
*Comment: The PC uses the term 'carnal intercourse against the order of nature'. Anal sex is equated with bestiality (s 1377 PC).*
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A



# BRUNEI DARUSSALAM



**Brunei's sexual offences laws are found in the *Penal Code 1951 (Cap 22) (PC) as amended, the *Children and Young Persons Act 2006 (Cap 219) (CYPA), and the *Unlawful Carnal Knowledge Act 1938 (Cap 29) (UCKA), which contains a single sexual offence - prohibition of carnal knowledge of a girl under 16 years. The *Syariah Penal Code Order 2013 (SPCO), which came into effect in April 2019, also contains sexual offences. The *Evidence Act 1939 (EA) as amended and *Criminal Procedure Code 1951 (CPC) contain rules applicable to sexual offences under the Penal Code. The EA and the CPC do not apply to Muslim Religious Courts, which have their own rules of procedure and evidence, which are not assessed here. The SPCO contains a number of sexual offences. It applies to Muslim and non-Muslim persons and is administered by Courts established under Part II of the *Syariah Courts Act (Chapter 184). A person tried under the SPCO cannot also be tried under the *Penal Code for the same or similar offences.**********

Neither the common law nor relevant case law is assessed in this report.

In a number of respects, the sexual offences law assessed in this report do not meet good practice standards. For example, marital rape and sexual assault are not crimes unless the victim was under 13 years. There is no express definition of consent as free and voluntary agreement and the legislation

does not state explicitly that there is no need for evidence of resistance to the assault, such as physical injuries, to prove that sexual activity took place without consent.

With respect to sexual offences against children, the *Penal Code* was amended in 2012 to provide for a range of important offences within the scope of this report, such as grooming. However, the *PC* does not cover all sexual acts against children, including boys. The *Unlawful Carnal Knowledge Act* is limited to girls, leaving out protection of boys. This is discriminatory and does not reflect good practice standards.

A full review of the *SPCO* is beyond the scope of this report, but of most relevance here are the offences of *Zina bil-jabar* – 'illicit intercourse' or 'non-consensual intercourse', *Liwat* – anal penetration between two men or a man and a woman who is not his wife, and *Musahaqah* – physical sexual acts between women. These offences are not consistent with good practice because they apply regardless of consent, do not criminalise marital rape and impose penalties that amount to torture or cruel, inhuman or degrading punishment. They also deny individual rights to privacy and freedom of expression.

Although penalties are not assessed in this report, it is noted that both the *Penal Code* and the *SPCO* provide for corporal and capital punishment, as well as terms of imprisonment for sexual offences. Both prescribe 'whipping' for a number of offences and the *SPCO* also provides for death by stoning or other forms of capital

punishment. In 2019, the Sultanate of Brunei announced it would extend the moratorium on the death penalty for some sexual offences (rape, adultery and 'sodomy'), but it remains in the law. These penalties should be removed as contrary to human rights compliant good practice standards.

Both the *Penal Code* and the *SPCO* criminalise consensual anal penetration between opposite-sex and same-sex persons and use language that is discriminatory and stigmatising to describe this activity, such as 'carnal intercourse against the order of nature' (PC). Although these offences apply to any person, these sexual acts are more commonly associated with male same-sex sexual activity. Criminalising consensual same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such

as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Brunei is a state party to some relevant international human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child* and *Convention on the Rights of Persons with Disabilities*. It has signed but not ratified the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. It has not joined the *International Covenant on Civil and Political Rights*.

# 1 Sexual Assault


## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

### Definition and scope of the crimes

**a Sexual assault crimes are gender-neutral** 


*Comment: Under the PC, rape is limited to unlawful 'sexual intercourse' by a man with a woman (s 375). There are general 'assaults against modesty' provisions that are gender-neutral on their face, but appear most likely to be applied to assaults of females (ss 354, 354A). There is also a specific offence of 'outrage of modesty' of a woman (s 504). Under the SPCO, some sexual offences apply to acts by both genders.*

**b Marital rape and sexual assault are crimes** 


*Comment: Under the PC, rape in marriage is not a crime if the wife is over the age of 13 (s 375 PC). Marital rape is a crime under the SPCO (s 75). The legislation does not meet good practice because it provides a defence of marriage to rape.*

**c Free and voluntary consent is required** 

*Comment: There is no express definition of consent requiring free and voluntary consent to be given (s 375 PC; s 75 SPCO, offence of Zina bil-jabar).*

**d Evidence of resistance is not required** 

*Comment: The law does not state that there is no need for evidence of resistance to the assault, such as physical injury, to prove that sexual penetration or touching took place without consent. It also does not state that consent cannot be inferred from a complainant's silence or submission during the assault.*

**e All non-consensual sexual acts involving penetration are offences** 

*Comment: Rape is the only specific sexual assault offence under the PC, and it is limited to penile penetration of a vagina (s 375). There are no offences that expressly criminalise non-consensual sexual penetration by other body parts or objects of other orifices. Other offences may cover these acts but this is not explicit in the legislation, for example: 'assaults or criminal force intending to outrage modesty' (s 354), 'aggravated outraging modesty' (s 354A); 'word, gesture or act intended to outrage the modesty of a woman' (s 504). The SPCO does not explicitly criminalise all forms of non-consensual sexual penetration.*

**f All non-penetrative, non-consensual physical sexual acts are criminal offences** 

*Comment: The legislation does not define the offences of 'assaults or criminal force intended to outrage modesty' (s 354) or 'aggravated outraging modesty' (s 354A) or the general provisions on 'hurt' (e.g. ss 319-320) to include all acts of non-consensual sexual touching, such as groping. Such acts may be covered but, it is not explicit in the legislation.*

### Rules of evidence and procedure

**g No corroboration required** 

*Comment: The EA specifically abrogates any requirement for a corroboration warning in sexual offences cases (s 134A). The position under the SPCO is not assessed here.*

**h Prior sexual conduct is inadmissible and irrelevant**



*Comment: This evidence is admissible in relation to a charge of rape (s 155(d) EA). The law does not provide any requirement that this evidence only be admissible with the leave of the court and only if it is relevant to the charges, or any other safeguards to protect the rights of a complainant to privacy and equality before the law. The position under the SPCO is not assessed here.*

**Crimes of power and violence not morality**

**i Terminology in sexual assault laws is legal and not moralistic**



*Comment: The PC uses terms that are moralistic, such as 'carnal intercourse' (s 377), 'outrage modesty' (s 504).*

## **2 Sexual Assault**

### **Additional Criteria in Relation to Children**

**Definition and scope of sexual offences against children**

**a There are specific child sexual assault offences**



*Comment: Child sexual offences include sexual grooming, sexual activity in front of a child under 16, voyeurism and child sexual imagery related offences. Assaults by a person in authority or trust (s 354B PC), and child 'sexual abuse' by a carer, are aggravated crimes (s 28, CYPA). There is inadequate protection for boys and there are no close-in-age defences. Several child sexual offences in the PC carry the penalty of whipping. Many sexual offences in the SPCO carry corporal and capital penalties. Even if not applied, they are contrary to human rights compliant good practice.*

**b Child sexual assault offences are gender-neutral**



*Comment: The specific child PC provisions are gender-neutral, but the offence under the UCKA only applies to girls.*

**c There is no defence of consent to child sexual assault offences (other than close-in-age defences)**





*Comment: This defence is not available under the PC. The position under the SPCO is not assessed here.*

### 3 Sexual Assault

#### Additional Criteria in Relation to People with Disability

Meets Criteria:  Yes  Partly  No  Unknown

#### Sexual offences laws treat people with disability equally

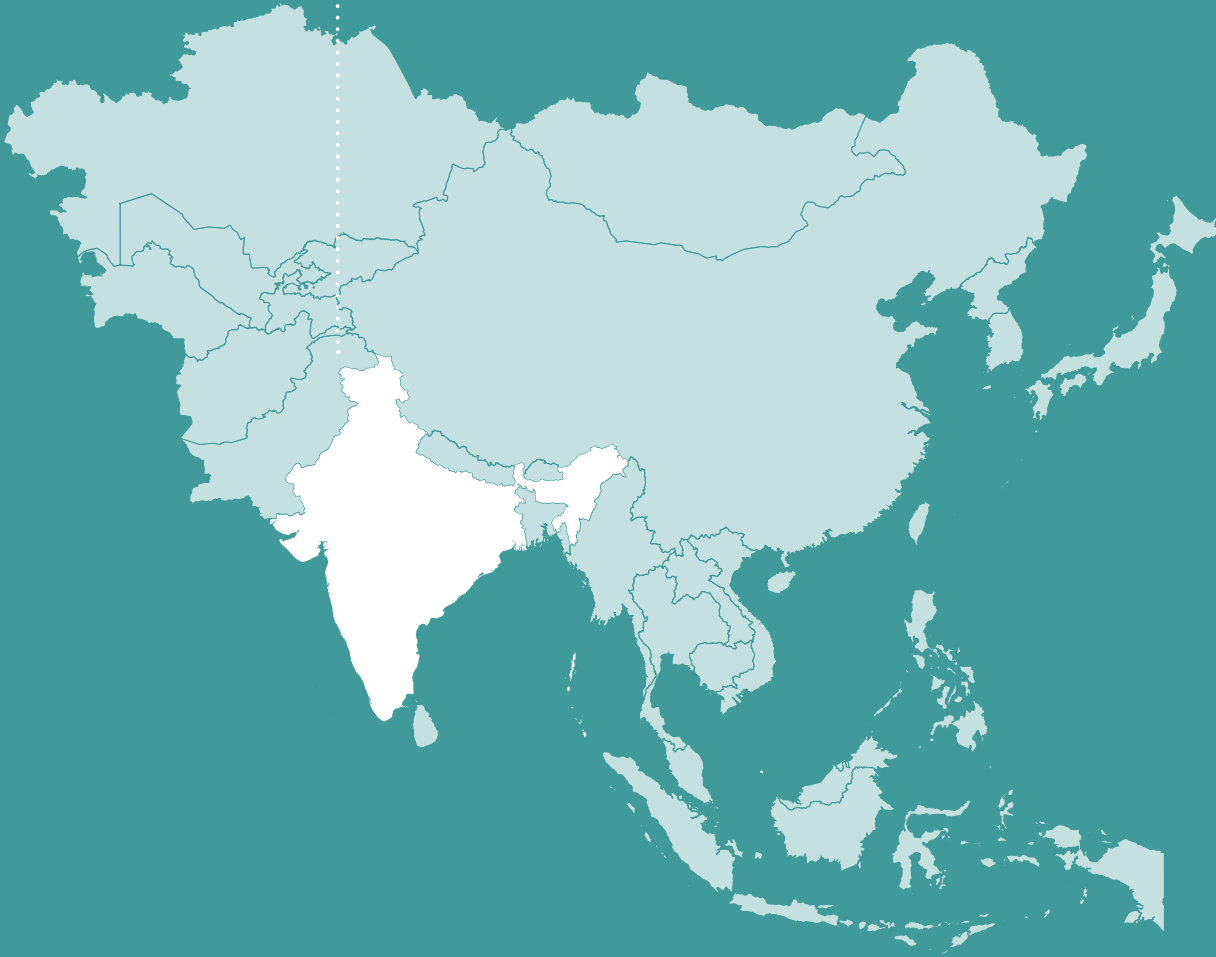
- a Consensual sexual activity with a person who has a disability is not an offence 
- b No discriminatory, derogatory or stigmatising language is used 

### 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

- a Consensual same-sex sexual activity is not a crime   
*Comment: Section 377 of the PC criminalises consensual same-sex sexual acts of 'carnal intercourse'. The SPCO criminalises male and female same-sex sexual activity (ss 82-3, 92).*
- b No discriminatory, derogatory or stigmatising language is used   
*Comment: The PC uses the terms 'unnatural offences' and 'against the order of nature' and equates consensual anal sex, whether same or opposite sex, with bestiality (s 377).*
- c No discriminatory age of consent laws where same-sex sexual activity is not a crime N/A

# INDIA





**India's sexual offences laws are in the *Indian Penal Code 1935 (IPC)*, as amended by the *Criminal Law (Amendment) Act 2013*, as well as the *Protection of Children from Sexual Offences Act 2012 (POCSO)*. The *Indian Evidence Act 1872* contains the evidentiary rules for all criminal offences, including sexual offences. The common law and relevant case law are not assessed in this report.**

In 2012-2013, India made significant changes to its sexual assault offences laws in response to a report by a three-member Committee headed by Justice J.S. Verma, former Chief Justice of the Supreme Court ('Verma Report'). The 'Verma Commission' recommended amendments to the criminal law to provide for quicker trials and enhanced punishments for sexual assault against women in response to public pressure after a gang rape. The Indian government implemented some of the Verma Commission's recommendations, including for example, expanding the definition of rape in the *IPC* to include all forms of non-consensual sexual penetration, defining 'consent' to mean 'unequivocal voluntary agreement when the woman by words, gestures, or any verbal or non-verbal communication communicates willingness to participate in the specific sexual act', and expressly legislating that evidence of resistance is not required to show there was no consent. Additionally, a targeted child sexual assault law was enacted, with some features that meet the good practice standards applied in this report. For example, a range of new offences were included, although they do not cover sexual grooming, sexual

communication with a child, or sexual activity in front of a child. The age of consent in India is 18.

Whilst much of the *IPC* and the *POCSO* meet the good practice criteria for sexual assault assessed in this report, some aspects do not. For example, the legislation does not criminalise rape and sexual assault in marriage unless the spouse who is the victim/survivor is under 18, or if the spouses are 'living separately'. Non-consensual sexual intercourse should be expressly criminalised in the legislation in every circumstance without exception. Allowing a defence of rape in marriage is discriminatory on the grounds of sex and marital status, which is contrary to good practice and human rights standards. Also, the legislation does not provide for close-in-age defences to protect young people from being prosecuted for genuinely consensual sexual activity with their peers when one or both are under the age of consent.

In 2018, the Supreme Court of India ruled that s 377 of the *IPC*, which had criminalised consensual same-sex sexual activity, was unconstitutional (*Navtej Singh Johar v. Union of India*). Section 377 should be repealed to reflect this decision.

India is a state party to relevant international human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *International Covenant on Civil and Political Rights* and *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.


# 1 Sexual Assault

## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

### Definition and scope of the crimes


a **Sexual assault crimes are gender-neutral** 

b **Marital rape and sexual assault are crimes** 


*Comment: Marital rape is only a crime in very limited circumstances – if the wife is under 18 (s 375 IPC) or the spouses are ‘living separately’ and sexual intercourse is without the consent of the wife (s 376B IPC).*


c **Free and voluntary consent is required** 

*Comment: Consent means an ‘unequivocal voluntary agreement when the woman by words, gestures, or any verbal or non-verbal communication communicates willingness to participate in the specific sexual act’ (s 375 IPC). Note that it is not gender-neutral. The IPC contains a list of circumstances in which consent cannot be given.*

d **Evidence of resistance is not required** 

*Comment: The legislation expressly states that lack of physical resistance does not equal consent (s 375 IPC). It does not specify that consent cannot be inferred from a complainant’s silence or submission during the assault. It is not gender-neutral.*


e **All non-consensual sexual acts involving penetration are offences** 

f **All non-penetrative, non-consensual physical sexual acts are criminal offences** 

*Comment: The IPC includes offences ‘to assault or use force to any woman’ to ‘outrage her modesty’ (s 354 IPC), to ‘disrobe or compel her to be naked’ (s 354B IPC); These offences are not defined to cover all non-penetrative, non-consensual sexual acts (e.g. groping or touching) of any person, male or female. Such acts may be covered, but it is not explicit in the legislation.*

### Rules of evidence and procedure

g **No corroboration required** 

h **Prior sexual conduct is inadmissible and irrelevant** 

*Comment: Evidence of the character of the complainant or of their previous sexual experience with any person ‘shall not be relevant on the issue of such consent or the quality of consent’ (s 53A EA).*

### Crimes of power and violence not morality

i **Terminology in sexual assault laws is legal and not moralistic** 




*Comment: The IPC uses the term ‘intent to outrage her modesty’ (s 354 IPC).*

## 2 Sexual Assault

### Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown



#### Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences**   
*Comment: Child sexual assault offences are limited (e.g. ss 3, 5, 7, 9, 11 POCSO; s 376AB, 376DA, 376DB IPC) (e.g. do not include sexual grooming, sexual communication with a child, sexual activity in front of a child). There are no close-in-age defences.*
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

## 3 Sexual Assault

### Additional Criteria in Relation to People with Disability

#### Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

## 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime** 
- b **No discriminatory, derogatory or stigmatising language is used**   
*Comment: The legislation refers to 'unnatural offences' and carnal knowledge against the order of nature'. Although s 377 has been declared unconstitutional and is null and void, this language remains in the IPC and should be repealed by the legislature.*
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** 

# MALAYSIA



**Malaysia, a federation of 13 states and three federal territories, has a federal *Penal Code 1936 (PC)* (as amended) containing sexual offences laws. Although the states are empowered to enact legislation on criminal offences under Islamic law, and many have done so, these are not assessed here. This report reviews only the federal *Penal Code*. The *Sexual Offences Against Children Act 2017 (SOCA)* contains a contemporary framework of child sexual assault offences. The *Evidence Act 1950* contains the rules of evidence that pertain to sexual offences. The common law and national case law are not assessed.**

Many provisions in the *SOCA* that are evaluated in this report meet good practice standards for child sexual assault offences. For example, the Act criminalises a range of gender-neutral child sexual assault offences, including sexual communication with a child, grooming, physical sexual assault of a child, non-physical sexual assault of a child and abuse or breach of trust to sexually exploit a child. The law expressly states that no child sexual assault offence requires corroboration. The age of consent is 18 for males and females for opposite-sex sexual activity. However, *SOCA* does not provide a close-in-age defence, which is a critical element in good practice child sexual assault law. These defences prevent criminalising genuinely consensual sexual activity between young people of a similar age when one or both of them is under the age of consent.

The sexual offences laws of Malaysia do not comprehensively address adult sexual violence and some of the laws assessed in this report do not meet good practice standards. Non-consensual penetration offences include rape, sexual connection and penetration by objects. Penetration of a vagina or anus by body parts other than a penis are not expressly criminalised. The law does not define consent to sexual activity as free and voluntary agreement by a person; does not specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent; or that evidence of a complainant's prior sexual conduct is inadmissible.

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***Although penalties are not assessed in this report, it is noted that penalties for rape in Malaysia include the death penalty which is contrary to good practice, human rights compliant standards.***

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The availability under the *Penal Code* of a marital rape defence in most circumstances does not meet standards of good practice. Marital rape is only a crime if the parties are judicially separated, there is an injunction restraining the husband from sexual intercourse with his wife, or during the period of 'iddah' if the victim/survivor is a Muslim woman living separately from her husband. The offence of 'husband causing hurt to have sexual intercourse with his wife' is inadequate. Non-consensual sexual intercourse should be expressly criminalised in the legislation in every circumstance without

exception. Not criminalising marital rape or providing for a defence of marriage to rape is discriminatory on the grounds of sex and marital status, violates other rights and is contrary to good practice standards.

Malaysia also criminalises consensual sexual activity that involves anal or oral penetration between opposite-sex and same-sex persons and uses language that is discriminatory and stigmatising to describe such activity, such as 'carnal intercourse against the order of nature'. Although these offences apply to any person, these sexual acts are more commonly associated with male same-sex sexual activity. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Malaysia is a state party to some relevant international human rights treaties, including the *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities* and the *Convention on the Elimination of All Forms of Discrimination against Women*. It is not a party to the *International Covenant on Civil and Political Rights* or the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.





Photo credit: Poh Wei Chuen








# 1 Sexual Assault



## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown


### Definition and scope of the crimes

- a Sexual assault crimes are gender-neutral**   
*Comment: The crime of 'rape' relates only to a man who rapes a woman (s 375PC). Other sexual offences such as 'sexual connection' (s 377A) and 'gross indecency' (s 377D PC) are gender-neutral.*
- b Marital rape and sexual assault are crimes**   
*Comment: Marital rape is only a crime in very limited circumstances - when the parties are judicially separated, if there is an injunction restraining the husband from sexual intercourse with his wife, or if the complainant is a Muslim woman, during the period of 'iddah' if they are living separately ( s 375 PC). There is also the offence of 'husband causing hurt to have sexual intercourse with his wife' with a penalty of 5 years (375A PC).*
- c Free and voluntary consent is required**   
*Comment: There is no express definition of consent requiring free and voluntary consent to be given.*
- d Evidence of resistance is not required**   
*Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not make clear that consent cannot be inferred from a complainant's silence or submission during the assault.*
- e All non-consensual sexual acts involving penetration are offences**   
*Comment: The PC criminalises penetration of vagina, anus and mouth by a penis or any object, but does not include penetration by other body part (s 375, 377C, 377CA PC). Such acts may be covered by other offences, but this is not explicit in the legislation and they may be treated less seriously.*
- f All non-penetrative, non-consensual physical sexual acts are criminal offences**   
*Comment: The PC has a number of offences including 'gross indecency', which is not defined (s 377D). The legislation does not specify that they cover all acts of sexual touching (e.g. groping) of any part of the body and there are no other offences that explicitly cover these acts.*

### Rules of evidence and procedure

- g No corroboration required** 
- h Prior sexual conduct is inadmissible and irrelevant**   
*Comment: Not expressly excluded in legislation. Common law rules are not assessed.*

### Crimes of power and violence not morality




- i Terminology in sexual assault laws is legal and not moralistic**   
*Comment: The PC uses the terms 'gross indecency' and 'carnal intercourse' (ss 377A, 377D PC).*

## 2 Sexual Assault

### Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown



#### Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences**   
*There is a comprehensive range of modern child sexual assault offences including sexual communication with a child, grooming, physical sexual assault and non-physical sexual assault (ss 11, 12, 14, 15 SOCA). Committing an offence while in a relationship of trust carries a higher penalty (s 16 SOCA).*
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

## 3 Sexual Assault



### Additional Criteria in Relation to People with Disability

#### Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

## 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime**   
*Comment: The PC has two offences which criminalise consensual sexual activity most associated with male same-sex sexual activity: 'sexual connection with another person by the introduction of the penis into the anus or mouth of the other person', which is 'carnal intercourse against the order of nature' (s 377A PC); and 'gross indecency', which is undefined (s 377D PC).*
- b **No discriminatory, derogatory or stigmatising language is used**   
*Comment: The PC uses the term 'carnal intercourse against the order of nature' (s 377A PC).*
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

# PAKISTAN



**Pakistan's sexual offences laws are found in the *Penal Code 1860 (PC)* as amended by the *Protection of Women (Criminal Laws Amendment) Act 2006 (PWA)*. The *Qanun-e-Shahadat Order 1984 (QSO)* contains the rules of evidence relevant to sexual offences. Neither the common law or relevant case law is assessed in this report.**

Pakistan does not have comprehensive laws to address sexual violence. Most of the sexual assault provisions assessed in this report do not meet good practice, for example: the definition of rape is gender specific as it is committed by men against women and covers only penile penetration of a vagina. The law does not take into account the full range of sexual acts that can violate the sexual integrity of a person, whether female or male. The law does not define consent to sexual activity as free and voluntary agreement by a person, does not specify that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent, or exclude evidence of a complainant's prior sexual conduct.

There is a single child sexual assault offence and it applies only to girls under 16. There are no close-in-age defences, which are necessary to prevent the criminalisation of consensual sexual activity between people of a similar age when one or both of them is under the age of consent. However, sexual relations outside of marriage is a crime under the *Offences Against Property (Enforcement of Hudood) Ordinance 1979*.

The age of consent for opposite-sex sexual activity in Pakistan is 16 years for girls. There is no minimum age of consent for boys.

Pakistan criminalises consensual same-sex sexual activity between males and the *PC* uses language that is discriminatory and stigmatising such as 'carnal intercourse against the order of nature'. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.







Pakistan is a state party to relevant international human rights treaties, including the *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and the *International Covenant on Civil and Political Rights*.

# 1 Sexual Assault



## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

### Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral**   
*Comment: The crime of 'rape' relates only to a 'man who has sexual intercourse with a woman' in prohibited circumstances (s 375 PC).*
- b **Marital rape and sexual assault are crimes**   
*Comment: The legislation does not expressly state that marital rape and sexual assault are crimes and that there is no exception for, or defence of marriage in any circumstance.*
- c **Free and voluntary consent is required** 
- d **Evidence of resistance is not required**   
*Comment: The legislation does not state that evidence of resistance to the assault, such as physical injury, is not required to prove that sexual penetration or touching took place without consent. It also does not provide that consent cannot be inferred from a complainant's silence or submission during the assault.*
- e **All non-consensual sexual acts involving penetration are offences**   
*Comment: The legislation does not specify that all acts of penetration, including of all orifices by any body part or object, are crimes. Such acts may be covered by other offences, but this is not explicit in the legislation and they may be treated less seriously.*
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences**   
*Comment: The legislation does not specify that all of these acts are crimes and does not define 'assaulting or using criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty' (s 354 PC) or other sexual offences to include them. Such acts may be covered, but it is not explicit in the legislation.*

### Rules of evidence and procedure

- g **No corroboration required**   
*Comment: Not expressly excluded in legislation. Common law rules are not assessed.*
- h **Prior sexual conduct is inadmissible and irrelevant**   
*Comment: The legislation states that a witness may be impeached: 'when a man is prosecuted for rape or an attempt to ravish, it may be shown that the prosecutrix was of generally immoral character' (151(4) QSO).*

### Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic**   
*Comment: The legislation uses terms including 'outrage modesty', 'attempt to ravish', 'immoral character'.*

## 2 Sexual Assault

### Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown



#### Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences**   
*Comment: There is one child sexual assault offence of sexual intercourse with a 'woman' under 16 (s 375 PC). There are no close-in-age defences.*
- b **Child sexual assault offences are gender-neutral**   
*Comment: The child sexual assault offence applies only to girls (s 375 PC).*
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)** 

## 3 Sexual Assault

### Additional Criteria in Relation to People with Disability

#### Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence** 
- b **No discriminatory, derogatory or stigmatising language is used** 

## 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime**   
*Comment: The legislation states that 'Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal commits a crime' (s 377 PC).*
- b **No discriminatory, derogatory or stigmatising language is used**   
*Comment: The PC uses the term 'carnal intercourse against the order of nature'. Anal sex is equated with bestiality (s 377 PC).*
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

# SINGAPORE



**Singapore's sexual offences laws are in the *Penal Code 2008 (PC)* as amended by the *Criminal Law Reform Bill 2019 (CLRB)*. The *Evidence Act 1997 (EA)* contains the evidentiary rules for all criminal offences.**

In February 2019, Singapore introduced the *Criminal Law Reform Bill*, which included amendments to some sexual offences in the *Penal Code*. At the time of writing, the Bill had not been Gazetted and was therefore not in force. However, the authors were advised by local legal experts that the Bill would be Gazetted early in 2020. For this reason, the report assesses the *Penal Code* as amended by the Bill.

Important amendments made by the Bill include removing marriage as a defence or exception to a charge of rape and adding specific child sexual offences covering sexual touching and sexual communication with a child. Sexual grooming of a minor under 16 was already an offence under the *PC*.

While the reforms are positive, there is still a significant gap between many of Singapore's sexual assault provisions covered in this report and good practice standards. For example, the requirement for corroboration and evidence of a complainant's prior sexual conduct are not expressly excluded by legislation, 'consent' is not expressly defined as free and voluntary agreement to sexual activity, and the legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. The defence of consent is available to child sexual assault offences if the offender was married to the complainant at the time of the offence and

there was consent. Singapore's legislation does not have a close-in-age exemption to avoid criminalising young people and children who engage in consensual sexual activity with their peers (e.g. a 16-year-old with a 15-year-old without any coercion or exploitation). The age of consent in Singapore for opposite-sex sexual activity is 16 years outside of marriage.

Same-sex sexual activity for women was decriminalised in 2007, but consensual same-sex sexual activity for men remains criminalised as 'outrages on decency' under Article 377A of the *Penal Code*. The maximum penalty is two years' imprisonment. Criminalising same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'buggery' and 'sodomy', should be repealed, even if they are not enforced. All non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and 'sexual assault', as well as in child sexual offences. All of these crimes should be gender-neutral.

Singapore provides for corporal punishment for some sexual offences (e.g. rape), which is inconsistent with good practice. Singapore is a state party to relevant international human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*. Singapore has not joined the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* or *International Covenant on Civil and Political Rights*.









# 1 Sexual Assault



## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown


### Definition and scope of the crimes

- a **Sexual assault crimes are gender-neutral** 
- b **Marital rape and sexual assault are crimes** 
- c **Free and voluntary consent is required**   
*Comment: There is no express definition of consent requiring free and voluntary consent to be given.*
- d **Evidence of resistance is not required**   
*Comment: The legislation does not make clear that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent. It also does not make clear that consent cannot be inferred from a complainant's silence or submission during the assault.*
- e **All non-consensual sexual acts involving penetration are offences** 
- f **All non-penetrative, non-consensual physical sexual acts are criminal offences**   
*Comment: The legislation does not define 'outrage of modesty' (s 345 CLRB) or 'insult of modesty' (s 509 CLRB) or specify that they include all acts of sexual touching (e.g. groping) of any part of the body. Such acts may be covered, but it is not explicit in the legislation.*

### Rules of evidence and procedure

- g **No corroboration required**   
*Comment: Not expressly excluded in legislation. Common law rules are not assessed.*
- h **Prior sexual conduct is inadmissible and irrelevant**   
*Comment: Not expressly addressed in the PC or CLRB. Some protections provided in the EA (ss 153, 154 & 154A), however these are inadequate.*

### Crimes of power and violence not morality

- i **Terminology in sexual assault laws is legal and not moralistic**   
*Comment: CLRB uses the term 'outrage of modesty' and 'insult of modesty' (ss 354, 509).*

## 2 Sexual Assault

### Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown



#### Definition and scope of sexual offences against children

- a **There are specific child sexual assault offences**   
*Comment: There are extensive, modern child sexual offences under the CLRB. However, there are no close-in-age defences or exceptions.*
- b **Child sexual assault offences are gender-neutral** 
- c **There is no defence of consent to child sexual assault offences (other than close-in-age defences)**   
*Comment: This defence is available if the parties were married at the time of the offence, the spouse was below 14 years of age, but older than 12 years of age and had consented (s 376A(4) & s 90(c) (CLRB)).*

## 3 Sexual Assault

### Additional Criteria in Relation to People with Disability

#### Sexual offences laws treat people with disability equally

- a **Consensual sexual activity with a person who has a disability is not an offence**   
*Comment: It is an offence to 'sexually touch' a person with a 'mental impairment' who cannot 'make a proper judgement in the giving of consent to the activity' (s 376F PC as amended by the CLRB). Further, it is not considered consensual if consent is given by a 'person who from unsoundness of mind, mental incapacity...is unable to understand the nature and consequence of that to which he gives his consent' (s 90(b) PC). The test for consensual sexual activity with a person with a disability should be the same as for a person without disability. Good practice legislation is disability-neutral, applying the same consent regime for all.*
- b **No discriminatory, derogatory or stigmatising language is used** 

## 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

- a **Consensual same-sex sexual activity is not a crime**   
*Comment: Consensual and non-consensual 'outrages on decency' between males are criminalised (s 377A PC as amended by the CLRB).*
- b **No discriminatory, derogatory or stigmatising language is used**   
*Comment: Uses the terms, 'outrages on decency', and 'acts of indecency'.*
- c **No discriminatory age of consent laws where same-sex sexual activity is not a crime** N/A

# SRI LANKA



**Sri Lanka's sexual offences laws are in the *Penal Code (Cap 25) (PC)*. The *Evidence Ordinance 1896 (as amended)* contains relevant rules of evidence. The common law and relevant case law are not assessed in this report.**

Many of Sri Lanka's sexual offences laws assessed in this report are outdated and may be discriminatory. Although the law criminalises non-consensual penetrative and non-penetrative sexual offences in accord with good practice standards, it also exempts rape in marriage in all circumstances except when the spouses are judicially separated. Sri Lanka established a committee to review the marital rape exemption, but at the time of writing the law had not been reformed. Not criminalising rape in marriage or providing for a defence of marriage to rape is discriminatory and contrary to good practice and international human rights law. It may also violate Sri Lankan constitutional equality guarantees.

Sri Lanka also criminalises consensual same-sex sexual activity for men and women. In 2017, the Sri Lankan government noted to the UN Human Rights Council that 'the general right to equality and non-discrimination, reflected in the Constitution [Articles 12 & 14], implicitly include non-discrimination on the grounds of sexual orientation.' It also said that 'the Supreme Court is of the view that imposing custodial sentences between consenting adults is inappropriate' (Report of the Working Group on the Universal Periodic Review, Sri Lanka, A/HRC/37/17, para 82). However, the *PC* has not been amended. Criminalising

consensual same-sex sexual activity has been held by recent court decisions in other Commonwealth jurisdictions, such as Belize, Botswana, India and Trinidad and Tobago, to be unconstitutional. Laws that criminalise consensual same-sex sexual activity, such as 'unnatural offences' and 'carnal intercourse against the order of nature', should be repealed and all non-consensual sexual acts, including anal 'rape', should be included in the standard sexual assault provisions, such as 'rape' and other sexual assault, as well as in child sexual offences. All of these crimes should be gender-neutral.

There are very limited stand-alone child sexual assault offences in the *PC*. Apart from a pornography-related offence, which is not assessed in this report, there is only the crime of 'sexual exploitation of children'. The general rape provision specifies rape of girls under 16 years. These offences are not comprehensive and do not expressly cover for example, sexual grooming, sexual communication with a child, or causing a child to watch sexual activity. There are no close-in-age defences, which are essential for good practice sexual offences laws as they prevent criminalising genuinely consensual sexual activity between young people of similar age when one or both is under the age of consent. The protection from child sexual assault is further weakened by the availability of the defence of marriage. Good practice requires no exception for marriage to a charge of rape.

The legislation exempts rape in marriage in all cases except when the parties are judicially separated or the victim/survivor is under 12 years.

Although the age of consent for opposite-sex sexual activity is 16 years, it lowers to 12 years when married. Non-consensual sexual intercourse should be expressly criminalised in every circumstance without exception. In addition, laws which permit marriage at a lower age than 18 do not reflect good practice standards based on international human rights. This is of even greater concern in jurisdictions, such as Sri Lanka, where there is a marital exemption to age of consent provisions.

Sri Lanka is a state party to some relevant international human rights treaties, including the *Convention on the Elimination of All Forms of Discrimination against Women*, *Convention on the Rights of the Child*, *Convention on the Rights of Persons with Disabilities*, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and *International Covenant on Civil and Political Rights*.





Photo credit: Asantha Abeysooriya

# 1 Sexual Assault


## Universal Criteria

Meets Criteria:  Yes  Partly  No  Unknown

### Definition and scope of the crimes

**a Sexual assault crimes are gender-neutral** 


*Comment: The crime of 'rape' is limited to females only (ss 363-364 PC). Offences of 'sexual harassment', which includes sexual assaults, and 'grave sexual abuse' are gender-neutral (e.g. ss 345, 346, 365B PC).*

**b Marital rape and sexual assault are crimes** 


*Comment: Marital rape is not a crime unless the parties are judicially separated or the wife is under 12 years (s 363 (a) and (e) PC). The legislation does not specify if this exemption also applies to 'grave sexual abuse' (s 365B PC) or other sexual offences.*


**c Free and voluntary consent is required** 

*Comment: There is no express definition of consent requiring free and voluntary consent to be given. The legislation specifies some circumstances where consent can never be given (s 363 (b) and (c) PC).*

**d Evidence of resistance is not required** 

*Comment: The legislation states that evidence of resistance to the assault, such as physical injuries to the body, is not necessary to prove that sexual activity took place without consent (s 363). To fully meet this criterion, the law should also specify that consent cannot be inferred from a complainant's silence or submission during the assault.*


**e All non-consensual sexual acts involving penetration are offences** 

**f All non-penetrative, non-consensual physical sexual acts are criminal offences** 

### Rules of evidence and procedure

**g No corroboration required** 

*Comment: Corroboration is generally required under the EO.*

**h Prior sexual conduct is inadmissible and irrelevant** 

*Comment: The 'sexual reputation' of a complainant is admissible (s 155(d) EO). The law states: 'when a man is prosecuted for rape or an attempt to ravish', it may be shown that the witness, including a complainant 'was of generally immoral character' in order to 'impeach her credit' (s 155(d) EO). The legislation states that evidence of prior sexual history with a person other than the accused is inadmissible to discredit the complainant (s 153 EO). There are inadequate safeguards for the privacy and other rights of a complainant (e.g. tests for relevance, probative value or prejudice to the complainant).*

### Crimes of power and violence not morality

**i Terminology in sexual assault laws is legal and not moralistic** 

*Comment: The legislation uses terms such as 'carnal knowledge', 'attempt to ravish', 'immoral character' (e.g. ss 363-364A PC).*

## 2 Sexual Assault


### Additional Criteria in Relation to Children

Meets Criteria:  Yes  Partly  No  Unknown


#### Definition and scope of sexual offences against children

**a** There are specific child sexual assault offences 

*Comment: Child sexual offences are limited to 'sexual exploitation of children' (s 360B PC) and rape of unmarried girls under 16 years, as part of the general rape offence (ss 363(e), 365B(aa) PC). There is no equivalent offence for boys. The legislation does not expressly criminalise offences such as sexual grooming, sexual communication with a child, or causing a child to watch sexual activity. There are no close-in-age defences. Child pornography offences are not assessed in this report.*

**b** Child sexual assault offences are gender-neutral 

*Comment: Offences apply only to girls.*

**c** There is no defence of consent to child sexual assault offences (other than close-in-age defences) 


*Comment: This criterion is not met because the defence is available if the parties were married at the time of the offence and 'the child is over the age of 12 and is not judicially separated from the man' (s 363E PC).*

## 3 Sexual Assault

### Additional Criteria in Relation to People with Disability

#### Sexual offences laws treat people with disability equally

**a** Consensual sexual activity with a person who has a disability is not an offence 

**b** No discriminatory, derogatory or stigmatising language is used 

## 4 Consensual Same-Sex Sexual Activity

#### Same-sex sexual activity is not a crime

**a** Consensual same-sex sexual activity is not a crime 

*Comment: The PC includes the crime of 'carnal intercourse against the order of nature' (s 365 PC). While this offence does not explicitly criminalise consensual same-sex sexual activity, it is interpreted as such.*

**b** No discriminatory, derogatory or stigmatising language is used 

*Comment: Uses the terms 'of unnatural offences', 'acts of indecency', 'carnal intercourse against the order of nature' and 'gross indecency' (s 365A PC). The crime is also equated to bestiality (s 365).*

**c** No discriminatory age of consent laws where same-sex sexual activity is not a crime N/A



# Endnotes

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- 1 The other organisations of the Alliance are the Kaleidoscope Trust, *The Royal Commonwealth Society and Sisters for Change*.
- 2 The Human Dignity Trust (2019) <<http://www.humandignitytrust.org/pages/NEWS/News?NewsArticleID=578>> (last accessed January 2020).
- 3 The Hon Theresa May, UK Prime Minister, 'Speech' (Speech delivered to the Commonwealth Joint Forum Plenary, UK, 17 April 2018) <<https://www.gov.uk/government/speeches/pm-speaks-at-the-commonwealth-joint-forum-plenary-17-april-2018>> (last accessed January 2020).
- 4 Resources (2019) The Human Dignity Trust <<https://www.humandignitytrust.org/hdt-resources/>> (last accessed January 2020).
- 5 UN human rights treaties available at <[www.ohchr.org](http://www.ohchr.org)>.
- 6 African Union, *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, (Maputo Protocol) 11 July 2003 <<https://icj-kenya.org/downloads/Publications/Maputo%20Protocol%20-%20A5.pdf> |> (accessed January 2020).
- 7 *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)* <<http://oas.org/en/mesecvi/convention.asp>> (accessed January 2020).
- 8 Council of Europe, *Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)*, <<https://www.coe.int/en/web/istanbul-convention/basic-texts>> (accessed January 2020).
- 9 For example, *Declaration on the Elimination of Violence against Women and Elimination of Violence against Children in the ASEAN Region 2012*, <[https://asean.org/?static\\_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4](https://asean.org/?static_post=declaration-on-the-elimination-of-violence-against-women-in-the-asean-region-4) (accessed January 2020).
- 10 *Pacific Leaders Gender Equality Declaration 2012*, <<https://www.forumsec.org/pacific-leaders-gender-equality-declaration/>>. See also <[http://www.pilonsec.org/images/stories/PLGED\\_intros.pdf](http://www.pilonsec.org/images/stories/PLGED_intros.pdf)>.
- 11 Yogyakarta Principles plus 10 (2016) <<https://yogyakartaprinciples.org/principles-en/yp10/>> (accessed January 2020).
- 12 Committee on the Elimination of Discrimination Against Women, *General Recommendation No 19: Violence against women*, 11th sess, contained in UN Doc A/47/38 (1992) <<https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.asp>> (accessed January 2020).
- 13 UN Women, *Handbook for Legislation on Violence against Women* (2012) (*UN Handbook*) and *Supplement to the Handbook for Legislation on Violence against Women, 'Harmful Practices'* (2012) <<http://www.unwomen.org/en/digital-library/publications/2012/12/handbook-for-legislation-on-violence-against-women>> (accessed January 2020).
- 14 See also for example, UN Office on Drugs and Crime (UNODC), *Model Strategies and Practical Measures for the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice* (1999) <[http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model\\_Strategies\\_and\\_Practical\\_Measures\\_on\\_the\\_Elimination\\_of\\_Violence\\_against\\_Women\\_in\\_the\\_Field\\_of\\_CP\\_and\\_CJ.pdf](http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Model_Strategies_and_Practical_Measures_on_the_Elimination_of_Violence_against_Women_in_the_Field_of_CP_and_CJ.pdf)> (accessed January 2020); Southern Africa Development Community (SADC) Parliamentary Forum, *Model Law on Eradicating Child Marriage and Protecting Children Already in Marriage* (2016).

- 15 Africa Commission on Human and Peoples' Rights, *Guidelines on Combating Sexual Violence and its Consequences in Africa (Naimey Guidelines)* (2017) <<https://www.achpr.org/legalinstruments/detail?id=4>> (accessed January 2020). Authoritative guidance on state implementation of regional treaties of relevance is provided by the expert bodies responsible for monitoring implementation. For example, the Follow-up Mechanism to the Belém do Pará Convention (MESECVI) in relation to the *Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)*, <<http://oas.org/en/mesecvi/about.asp>> (accessed January 2020).
- 16 The criteria used to assess rape and sexual assault laws in this report reflect the fact that the vast majority of Commonwealth states distinguish between sexual and other assaults and between penetrative (e.g. rape) and non-penetrative (e.g. indecent assault) sexual offences with the penalty usually varying according to the *nature of the assault*. One Commonwealth country, Canada, takes a different approach. It includes sexual assault as part of its general assault offences and grades the offences and penalties according to the perceived *degree of harm* to the complainant rather than on the nature of the assault (see Canada checklist in Part C in the Caribbean and Americas Regional Report). This approach can also meet good practice standards applied in this report.
- 17 See, for example, *The Global Rape Epidemic* (2017) Equality Now [Gaps in protecting women and girls from sexual violence] <[https://www.equalitynow.org/the\\_global\\_rape\\_epidemic\\_campaign](https://www.equalitynow.org/the_global_rape_epidemic_campaign)> (accessed January 2020).
- 18 P. Imrana Jalal, *Handbook on Law for Pacific Women, A Legal Rights Handbook* Fiji Women's Rights Movement, (1998) (*Handbook on Law for Pacific Women*) 74 <[http://www.fwrn.org.fj/images/fwrn2017/PDFs/resources/Law\\_for\\_Pacific\\_Women.pdf](http://www.fwrn.org.fj/images/fwrn2017/PDFs/resources/Law_for_Pacific_Women.pdf)> (accessed January 2020).
- 19 *R v R* [1992] 1 A.C. 599.
- 20 For example, see Committee on the Rights of the Child, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, UN Doc CRC/C/GC/20 (6 December 2016) [40].
- 21 Petroni, S., Das M, Sawyer S. (2018). The Lancet Child & Adolescent Health. *Protection versus rights: age of marriage versus age of sexual consent*, December 3, 2018. Quoted in *Marriage vs Age of Sexual Consent*, Girls Not Brides, <https://www.girlsnotbrides.org/wp-content/uploads/2019/01/Age-of-Marriage-brief.pdf> (accessed January 2020).
- 22 Committee on the Rights of the Child, *General comment No. 13 (2011) on The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [25].
- 23 See, for example, the observations about assumptions or myths made about women and girls with disability by the Committee on the Rights of Persons with Disabilities, *General Comment No 3 (2016) on women and girls with disabilities*, 16th sess, UN Doc CRPD/C/GC/3 (25 November 2016) [30] & [38] <[https://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en](https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD/C/GC/3&Lang=en)> (accessed January 2020).
- 24 See, for example, D Stubbs & S Tawake (2009) *Pacific Sisters with Disabilities: At the intersection of discrimination* (UNDP Pacific Centre, Suva, Fiji, 2009) < <https://pacificwomen.org/research/pacific-sisters-with-disabilities/>> (accessed January 2020).

- 25 For detailed information on countries that criminalise consensual same-sex sexual activity please see [www.humandignitytrust.org](http://www.humandignitytrust.org).
- 26 For example, in 1981, in the case of *Dudgeon*, the European Court held that laws in Northern Ireland that criminalised same-sex sexual activity violated the right to privacy under article 8 of the European Convention on Human Rights, even when they were not enforced. It ruled that no state in its jurisdiction had the right to criminalise all same-sex sexual activity. *Dudgeon v United Kingdom*, Appl No 7525/76, Council of Europe: European Court of Human Rights, 22 October 1981 (*Dudgeon*) <<https://www.refworld.org/cases,ECHR,47dfaf7d.html>> (accessed January 2020). Also, *Norris v Ireland*, 13 Eur. H.R. Rep. 186 (1988) <[https://www.humandignitytrust.org/wp-content/uploads/resources/Norris\\_v\\_Ireland.pdf](https://www.humandignitytrust.org/wp-content/uploads/resources/Norris_v_Ireland.pdf)> (accessed January 2020); *Modinos v Cyprus*, 7/1992/352/426, Council of Europe: European Court of Human Rights, 23 March 1993 <<https://www.refworld.org/cases,ECHR,402a21a04.html>> (accessed January 2020).
- 27 *Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994 <<https://www.refworld.org/cases,HRC,48298b8d2.html>> (accessed January 2020).
- 28 See, for example, UN Commission on Human Rights, *Promotion and Protection of Human Rights: 2003/... Human rights and sexual orientation*, 59th sess, Agenda Item 17, UN Doc E/CN.4/2003/L.92 (17 April 2003) <<https://undocs.org/en/E/CN.4/2003/L.92>>; H E Wegger Christian Strømme, *2006 Joint State: 3rd session of the Human Rights Council* (1 December 2006) ARC International <<http://arc-international.net/global-advocacy/sogi-statements/2006-joint-statement/>> (accessed January 2020); *Report of the Human Rights Council: 17/19 Human rights, sexual orientation and gender identity*, 17th sess, UN Doc A/66/53 (17 June 2011) 172 <<https://www.right-docs.org/doc/a-hrc-res-17-19/>> (accessed January 2020).
- 29 African Commission on Human and Peoples' Rights, *275: Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity* (2014) <<https://www.achpr.org/sessions/resolutions?id=322>> (accessed January 2020).
- 30 *Yogyakarta Principles plus 10* (2016) <<https://yogyakartaprinciples.org/principles-en/yp10/>> (accessed January 2020).

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